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Supreme Court, U.S.
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No. _____

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In The

Supreme Court of the United States

October Term, 1996

THOR CHRISTENSEN and
JOSEPH WOODROW PANKEY, JR.,
Petitioners,

v.

MICHAEL D. GRIFFES, COMMISSIONER
OF MOTOR VEHICLES,
Respondent.

Petition For A
Writ of Certiorari
To The Supreme Court Of The State Of Vermont

PETITION FOR A WRIT OF CERTIORARI

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SUPREME COURT, U.S.

QUESTIONS PRESENTED

1. Does a State which compels the payment of unconstitutional taxes over many years but refuses to pay interest on tax refunds violate the Due Process Clause, by failing to provide a post-deprivation remedy which places taxpayers in the position they would have been in but for the constitutional violation?

2. Does a State in the same circumstances violate the Just Compensation Clause, by using funds which rightfully belong to private individuals for a public purpose without compensation?

TABLE OF CONTENTS

Page

Questions Presented i

Table Of Authorities iii

Opinions Below 2

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement 3

Reasons For Granting Certiorari 8

I. THE LOWER COURTS ARE DEEPLY DIVIDED ON WHETHER INTEREST MUST BE PAID ON REFUNDS OF ILLEGAL TAXES PAID UNDER DURESS. 10

II. LOWER COURT RULINGS DENYING INTEREST ON ILLEGAL TAXES PAID UNDER DURESS APPEAR TO CONFLICT WITH THIS COURT'S DECISIONS IN *McKESSON* AND *WEBB'S FABULOUS PHARMACIES* 16

III. THE DECISION BELOW IS UNPERSUASIVE AS A MATTER OF LAW AND DISTURBING AS A MATTER OF POLICY 19

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Albertville v. Scott, 104 So. 2d 921 (Ala. 1958) 11

American Trucking Ass'ns v. Conway (ATA I),
508 A.2d 405 (Vt. 1986), *cert. denied*,
483 U.S. 1020 (1987) 24

American Trucking Ass'ns v. Conway (ATA II),
508 A.2d 408 (Vt. 1986), *cert. denied*,
483 U.S. 1019 (1987) 24

American Trucking Ass'ns v. Conway (ATA III),
566 A.2d 1323 (Vt. 1989) 24

American Trucking Ass'ns v. Scheiner,
483 U.S. 266 (1987) 25

American Trucking Ass'ns v. Smith,
496 U.S. 167 (1990) 25

Antero & Lost Park Reservoir Co. v.
Park County, 225 P. 269 (Colo. 1924) 14

Armstrong v. United States, 364 U.S. 40 (1960) 23

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 25

Ball v. County of Los Angeles, 147 Cal. Rptr. 252, 82 Cal. App. 3d 312 (1978), *cert. denied*, 439 U.S. 1116 (1979) 14

Barringer v. Griffes (Barringer I), 964 F.2d 1278 (2d Cir. 1992) 4, 5, 9, 24

Barringer v. Griffes (Barringer II), 1 F.3d 1331 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 879 (1994) . . . . . *passim*

In re Black, 775 P.2d 484 (Wyo. 1989) 16

Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978) 18, 21

Boot Cotton Mills v. Lowell, 34 N.E. 367 (Mass. 1893) . . 12

Cannon v. Maxwell, 171 S.E. 624 (N.C. 1933) 15

Chicago Freight Car Leasing Co. v. Limbach, 584 N.E.2d 690 (Ohio 1992) 9, 16

Chicago, S.P., M.&O. Ry. v. Mundt, 229 N.W. 394 (S.D. 1930) 12

Christensen v. Griffes, 7 Vt. L.W. 331 (Nov. 15, 1996) 4, 8, 16

Cincinnati v. Cincinnati S. Ry., 187 N.E. 312 (Ohio 1933) 15

City of Opa-Locka v. Buckress Land Co.,
247 So. 2d 339 (Fla. Dist. Ct. App. 1971) 12

Cleveland Concession Co. v. Peck,
117 N.E.2d 429 (Ohio 1954) 15

Colonial Life and Accident Ins. v.
South Carolina Ins. Comm., 103 S.E.2d 908
(S.C. 1958) 15

Commonwealth of Kentucky v. Kentucky Gas Service,
286 S.W.2d 911 (Ky. 1956) 14

County of Ada v. Red Steer
Drive-Ins, 609 P.2d 161 (Idaho 1980) 12, 13

Crown Concrete Co. v. Conkling,
75 N.W.2d 351 (Iowa 1956) 14

Daniels Tobacco Co. v. Norberg, 335 A.2d 636
(R.I. 1975) 15

Davis v. Michigan Department of Treasury,
489 U.S. 803 (1989) 9

Department of Revenue v. American Motorists Ins.,
396 N.E.2d 907 (Ind. Ct. App. 1979) 12

Eaton v. St. Louis S.F. Ry., 251 P. 1032 (Okla. 1925) . . . 15

Educational Films Corp. v. Ward, 282 U.S. 379
(1931) 11

Ellsworth Freight Lines, Inc. v. State Tax Comm.,
651 S.W.2d 130 (Mo. 1983), *cert. denied*,
465 U.S. 1001 (1984) 9, 15

Erskine v. Van Arsdale, 82 U.S. (15 Wall.) 75 (1872) . . . 13

Fajardo Sugar Co. v. Richardson, 7 P.R.R. 154
(P.R. 1914) 15

Ford Motor Co. v. Baker, 300 N.W. 435 (N.D. 1941) . . . 15

Ford Motor Co. v. City of Detroit, 204 N.W.2d 348
(Mich. 1972) 12

In re Four-Fifty-Two-Thirty Corp., 322 So.2d 525
(Fla. 1975) 14

General Electric Co. v. Passaic, 138 A.2d 545
(N.J. 1958) 15

Gulf of M.&O. Ry. v. Webster County,
13 So. 2d 644 (Miss. 1943) 15

Harper v. Virginia Dept. of Taxation,
462 S.E. 2d 892 (Va. 1995). 9

Holton and Hunkel Greenhouse Co. v. State,
80 N.W.2d 371 (Wis. 1957) 16

Hopkins v. Southern California Tel.,
275 U.S. 393 (1928) 11

International Paper Co. v. Burrill, 260 F. 664
(D. Mass. 1919) 13

Kaemmerling v. State, 128 A. 6 (N.H. 1924) 15

Ketchikan Spruce Mills v. Dewey, 17 Alaska 336 (1957) . . 11

Kittredge v. Boyd, 20 P.2d 811 (Kan. 1933) 14

Lady v. Prince Georges County, 403 A.2d 1277 (Md. 1979) 14

Lakefront Realty Corp. v. Lorenz, 167 N.E.2d 236 (Ill. 1960) 14, 16

Leverson v. Conway, 481 A.2d 1029 (Vt. 1984), *vacated and remanded*, 472 U.S. 1014 (1985) 3

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) . . . 21

Lone Star Cement Corp. v. City of Seattle, 429 P.2d 909 (Wash. 1967) 13

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 22

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 22

Marsh v. Brown, 325 A.2d 466 (Conn. 1974) 14

Maurice L. Bein, Inc. v. Housing Authority, 321 P.2d 753 (Calif. 1958) 14

McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990) . . . . . *passim*

McMurty v. State, 151 A. 252 (Conn. 1930) 12

Metropolitan Life Ins. v. State, 144 N.E. 420 (Ind. 1924) 12

Miranda v. Arizona, 384 U.S. 436 (1966) 23

Mullaney v. Hess, 189 F.2d 417 (9th Cir. 1951) 11

New England Mutual Life v. Reece, 83 S.W.2d 238 (Tenn. 1935) 16

New York Life Ins. v. Anderson, 263 F. 527 (2d Cir. 1920) 13

Nutt v. Ellerbe, 56 F.2d 1058 (E.D.S.C. 1932) 11

In re O'Berry, 72 N.E. 109 (N.Y. 1904) 12, 13

Owen v. City of Independence, 445 U.S. 622 (1980) 23

Peabody Coal Co. v. Navajo County, 572 P.2d 797 (Ariz. 1977) 12

Pendell v. Department of Revenue, 847 P.2d 846 (Or. 1993) . . . . . *passim*

Procter & Gamble Distributing Co. v. Sherman, 2 F.2d 165 (S.D.N.Y. 1924) 10

Railway Express Agency v. Virginia, 87 S.E.2d.188 (Va. 1955) 16

Sims v. White, 522 So. 2d 239 (Ala. 1988) 13

Standard Oil Co. v. State, 276 N.W. 908 (Mich. 1937) . . 12

State v. Southwest Lumber Mills, Inc., 297 P.2d 1099 (Ariz. 1956) 12

United States v. Livingston, 179 F. Supp. 9 (E.D.S.C. 1959) 11

Washow Investment, Inc. v. State, 532 P.2d 265 (Nev. 1975) 13

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) . . . . . *passim*

Williams v. Harvey, 6 P.2d 418 (Mont. 1931) 12

Williams v. Vermont, 427 U.S. 14 (1985), *on remand*, 589 A.2d 840 (Vt. 1990), *cert. denied*, 502 U.S. 821 (1991) . . . . . *passim*

STATUTES

28 U.S.C. § 1257 2

V.R.Civ.P. 12 . . . . . 5, 20

Vt. Stat. Ann. tit. 19, § 12 (1987) 19

Vt. Stat. Ann. tit. 23, § 301 (1987) 20

Vt. Stat. Ann. tit. 23, § 2302 (1987) 20

Vt. Stat. Ann. tit. 32, § 8911 (Supp. 1996) . . . . . *passim*

MISCELLANEOUS

M.L. Cross, Annotation, *Right to Interest on Tax Refund or Credit in Absence of Specific Controlling Statute*, 88 A.L.R. 2d 825 (1963 & Supp. 1996) 11

Richard H. Fallon and Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1733 (June 1991) 23

John E. Lockwood, et al., *The Use of the Federal Injunction in Constitutional Litigation*, 43 Harv. L. Rev. 426 (1930) 11

Antonin Scalia, *The Rule of Law as a Law of Rule*, 56 U. Chi. L. Rev. 1175 (Fall 1989) 22

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PETITION FOR A WRIT OF CERTIORARI

Thor Christensen and Joseph Woodrow Pankey, Jr., respectfully petition for a writ of certiorari to review the judgment of the Vermont Supreme Court in this case.

OPINIONS BELOW

The opinion of the Vermont Supreme Court (App. 1a) is reported at 7 Vt. L.W. 331 (Nov. 15, 1996). The opinion of the State Superior Court (App. 22a) is not reported.

JURISDICTION

The judgment of the Vermont Supreme Court was entered on November 15, 1996. (App. 1a). On January 30, 1997, Justice Ginsburg issued an order extending the time for filing a petition for a writ of certiorari to and including March 17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment provides:

> [N]or shall any State deprive any person of life, liberty or property, without due process of law. . . .

2. The Due Process and Just Compensation Clauses of the Fifth Amendment provide:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. 1994 Vt. Laws 223 (*set forth in note following* Vt. Stat. Ann. tit. 32, § 8911 (Supp. 1996)).
[The text of this legislation is reprinted at App. 29a]

STATEMENT

1. *Summary.* On June 20, 1994, the Vermont Legislature passed a special bill authorizing tax refunds, without interest, of unconstitutional motor vehicle taxes which the Commissioner had collected from individuals moving into the State since September 1, 1980. App. 29a. On November 15, 1996, the Vermont Supreme Court upheld the "no-interest" provision against a challenge brought by Petitioners and other class members under the Due Process and Just Compensation Clauses of the federal Constitution. App. 1a. Petitioners had been forced to pay the tax many years earlier and had been litigating their right to a refund ever since. Petitioners seek review of the Vermont Supreme Court's decision.

2. *Background.* The State Supreme Court's decision is the latest chapter in a 13-year effort by Petitioners and others to overturn the State's motor vehicle tax and obtain an adequate remedy. The litigation has resulted in one opinion by this Court;[1] three by the Vermont Supreme Court;[2] and two by the

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[1] *Williams v. Vermont*, 472 U.S. 14 (1985).

[2] *Leverson v. Conway*, 481 A.2d 1029 (Vt. 1984), *vacated and remanded*, 472 U.S. 1014 (1985); *Williams v. State*, 589 A.2d 840 (Vt. 1990), *cert. denied*, 502 U.S. 821

Second Circuit Court of Appeals.[3] Surveying the litigation, the Second Circuit observed: "Like Sisyphus, Vermont taxpayers have labored to bring their constitutional claims to the pinnacle of judicial review, only to be turned away from the Vermont courts when a disposition of the claims seemed near." *Barringer v. Griffes (Barringer I)*, 964 F.2d 1278, 1284 (2d Cir. 1992).

The litigation stems from the State of Vermont's decision in 1980 to begin charging nonresidents moving into Vermont a second sales tax on their cars, with no credit for sales taxes already paid in other states.[4] Residents, by contrast, were granted a tax credit for vehicles purchased out-of-state. *See* former Vt. Stat. Ann. tit. 32, § 8911(9) (1991) (amended 1994) (Supp. 1996). In *Williams v. Vermont,* 427 U.S. 14 (1985), this Court ruled that the State's failure to grant a tax credit to nonresidents "denies them the equal protection of the laws." *Id.* at 15. It then remanded the case for a factual determination, based on the State's assertion that Vermont residents were not in fact granted a tax credit as a matter of practice. *Id.* at 28.

(1991); *Christensen v. Griffes*, 7 Vt. L.W. 331 (Nov. 15, 1996).

[3] *Barringer v. Griffes (Barringer I)*, 964 F.2d 1278 (2d Cir. 1992); *Barringer v. Griffes (Barringer II)*, 1 F.3d 1331 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 879 (1994).

[4] Prior to September 1, 1980, nonresidents were exempt from the motor purchase and use tax under former Vt. Stat. Ann. tit. 32, § 8911(6) (repealed).

Three years after the remand, the Vermont Supreme Court dismissed the *Williams* case for a second time, even though the factual determination called for by this Court had never been made. *See Williams v. State (Williams II)*, 589 A.2d 840 (Vt. 1990), *cert. denied*, 502 U.S. 821 (1991). The State Supreme Court ruled that the taxpayers could *not* have sought an administrative refund initially because the constitutionality of a state statute was at issue. However, it said, once the U.S. Supreme Court ruled that their Complaint stated a cause of action, their only recourse *was* to seek administrative relief and their court challenge had to be dismissed. 589 A.2d at 847-49.

Following the State Supreme Court's decision in *Williams II*, two individuals named Greg and Judith Barringer filed an action for declaratory and injunctive relief in Vermont Superior Court before paying the tax. The State moved to dismiss under V.R.Civ.P. 12, asserting that the Barringers were required to pay the tax first and seek an administrative refund later under Vt. Stat. Ann. tit. 32, § 8914 (1991). In response, the Barringers dismissed the suit and filed an action for injunctive relief in federal court. After ruling in *Barringer I* that federal jurisdiction existed, the Second Circuit held on August 9, 1993, that Vermont's motor vehicle purchase and use tax was unconstitutional under the Commerce Clause. *Barringer v. Griffes (Barringer II)*, 1 F.3d 1331 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 879 (1994).

3. *Petitioners' Tax Refund Request.* Petitioner Thor Christensen was compelled to pay a second sales tax to Vermont in order to register his van and jeep after moving to Vermont from Indiana in 1985. Petitioner Woodrow Pankey,

Jr. similarly had to pay Vermont sales tax on his pick-up truck when he moved from Louisiana in 1984. Petitioners Christensen and Pankey, together with three other plaintiffs who subsequently withdrew, filed an action for refund of their taxes on June 17, 1986. Following *Williams II*, the action was dismissed by the Vermont Supreme Court in an unpublished entry order dated April 14, 1993, based on lack of subject matter jurisdiction. App. 28a. On September 2, 1993, Petitioners filed administrative requests for tax refunds and interest with the Commissioner of Motor Vehicles, after the Second Circuit's decision in *Barringer II*. App. 11a, 12a.

The Commissioner took no action on the Petitioners' refund requests for four months, but he announced that he would not provide refunds for taxes paid prior to the decision in *Barringer II*. Petitioners then filed a mandamus action in the Vermont Superior Court on January 31, 1994, to require the Commissioner to pay tax refunds with interest. App. 13a.

On June 20, 1994, the Vermont Legislature passed Act No. 223, directing the Commissioner to refund, *without interest,* all motor vehicle purchase and use taxes which had been collected unconstitutionally. App. 29a. Petitioners were refunded the principal amount they had paid many years earlier, but interest was refused. The Superior Court then certified the Complaint as a class action to address Petitioners' interest claims. App. 20a, 21a. On May 5, 1995, the court granted "summary judgment and judgment on the pleadings," App. 22a, and it subsequently denied reconsideration. App. 27a.

4. *Vermont Supreme Court Decision.* On appeal, the Vermont Supreme Court affirmed the lower court's dismissal.

App. 1a. The State Supreme Court rejected Petitioners' federal due process claim under *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), on the ground that *McKesson* had not addressed or decided the issue of interest on tax refunds. App. 3a-4a. It declined to "extend" the holding. *Id.* The State Supreme Court also rejected Petitioners' Just Compensation Claim, holding, as a matter of law, that the deprivation was not "so extreme or burdensome" as to invoke the Just Compensation Clause. App. 3a. It distinguished this Court's decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), on factual grounds, stating that that case did not "assert[ ] Taxpayers' position that failure to pay interest on a tax refund amounts to a taking." *Id.*

In a concurrence, two justices concluded that a State may rely on the "flexible remedy" endorsed by *McKesson* to avoid paying interest on tax refunds under the Due Process Clause. App. 6a-8a. The concurrence stated that *Webb's* also did not require the payment of interest, because the interpleader fund in that case was "concededly private," whereas the tax here "was levied by the State for public purposes." App. 9a.

REASONS FOR GRANTING CERTIORARI

This Court should grant review to resolve the important and recurrent question of whether States may retain interest on unconstitutional or illegal taxes paid under threat of civil or criminal sanctions, where no pre-deprivation remedy is offered. The issue has provoked a deep split in the jurisdictions over many years, and it affects many thousands of individuals. This Court and lower federal courts have long held that the payment of tax refunds without interest is an inadequate remedy, but the state courts are divided. The Vermont Supreme Court held below that interest need not be paid, and 23 other state courts have agreed. On the other hand, at least 14 state courts have required payment of interest in the absence of a controlling statute. This Court's decisions in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), and *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), indicate that the practice of retaining interest in such circumstances violates both the Due Process and Just Compensation Clauses.

Despite the requirement of *McKesson* that a State which provides only post-deprivation relief must restore the taxpayer to the position he or she would have been in but for the constitutional violation, 496 U.S. at 42, three State Supreme Courts have now expressly refused to apply that rule to require interest on post-deprivation tax refunds. *See Christensen v. Griffes*, 7 Vt. L.W. 331 (Nov. 15, 1996) (*reprinted at* App. 1a) (motor vehicle tax on nonresidents moving to state); *Pendell v. Dept. of Revenue*, 847 P.2d 846 (Or. 1993) (tax on federal

retirement income); *Chicago Freight Car Leasing Co. v. Limbach*, 584 N.E. 2d 690 (Ohio 1992) (tax on out-of-state railroad). Yet similarly-situated taxpayers in other states have recently received interest on refunds of unconstitutional taxes. *See, e.g., Harper v. Virginia Dept. of Taxation*, 462 S.E. 2d 892, 898 (Va. 1995) (federal retirees).

The Vermont and Oregon decisions indicate the widespread impact of the issue. The Vermont Legislature in this case passed a special bill denying interest on motor vehicle tax refunds to tens of thousands of individuals who had been forced to pay the unconstitutional tax after moving to Vermont since 1980. The bill followed a decision by the Second Circuit declaring that the tax violated the Commerce Clause and enjoining its collection. *See Barringer v. Griffes*, 1 F.3d 1331 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 879 (1994). The Oregon Supreme Court similarly denied interest on tax refunds to all federal retirees in that state. *See Pendell*, 847 P.2d at 848-51. Such individuals had been forced to pay tax on their pension income while retired state employees were exempt, a practice this Court condemned in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989). Interstate businesses have also felt the pinch in recent years. *See, e.g., Chicago Freight Car Leasing Co.*, 584 N.E.2d at 694-95 (no interest on refund of state "carline tax" found invalid under federal Railroad Revitalization and Regulatory Reform Act); *Ellsworth Freight Lines, Inc. v. State Tax Comm.* 651 S.W.2d 130, 133-34 (Mo. 1983), *cert. denied*, 465 U.S. 1001 (1984) (no interest on refund of illegal truck registration fees).

I. THE LOWER COURTS ARE DEEPLY DIVIDED ON WHETHER INTEREST MUST BE PAID ON REFUNDS OF ILLEGAL TAXES PAID UNDER DURESS.

Although the issue has been litigated since early in the century, the lower courts have not reached a consensus on whether interest must be paid on tax refunds. Federal courts, beginning with Judge Learned Hand's decision in *Procter & Gamble Distributing Co. v. Sherman*, 2 F.2d 165 (S.D.N.Y. 1924), have consistently held that the payment of interest on tax refunds is essential to provide taxpayers with an adequate remedy. As Judge Hand said:

> . . . it seems to me plain that it is not an adequate remedy, after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all. Whatever may have been our archaic notions about interest, in modern financial communities a dollar today is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong.

2 F.2d at 166.

This Court has concurred. *See Educational Films Corp. v. Ward*, 282 U.S. 379, 386 and note 2 (1931) (finding federal jurisdiction based on lack of adequate remedy where interest not paid on tax refunds); *Hopkins v. Southern California Tel.*, 275 U.S. 393 (1928) (same). Other federal courts are also in agreement. *See Mullaney v. Hess*, 189 F.2d 417, 420 (9th Cir. 1951); *United States v. Livingston*, 179 F.Supp. 9, 15 (E.D.S.C. 1959); *Nutt v. Ellerbe*, 56 F.2d 1058, 1062 (E.D.S.C. 1932). So are commentators. *See* John E. Lockwood, et al., *The Use of the Federal Injunction in Constitutional Litigation*, 43 Harv.L.Rev. 426, 435 (1930).

A substantial minority of state courts have similarly held that the payment of interest on tax refunds is required.[5] Many

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[5] The courts of at least 14 states have mandated payment of interest on tax refunds, where the tax refund statute was silent. Before Congress passed a statute specifically authorizing interest on federal tax refunds, federal courts also had required it. The case law is summarized by M.L. Cross, Annotation, *Right to Interest on Tax Refund or Credit in Absence of Specific Controlling Statute*, 88 A.L.R.2d 825 (1963 & Supp. 1996). State courts which have required interest on tax refunds include:

> Alabama: *Albertville v. Scott*, 104 So.2d 921 (Ala. 1958).
>
> Alaska: *Ketchikan Spruce Mills v. Dewey*, 17 Alaska 336 (1957); *Mullaney v. Hess*, 189 F.2d 417 (9th Cir. 1951) (stating rule in Alaska).

Arizona: *Peabody Coal Co. v. Navajo County*, 572 P.2d 797 (Ariz. 1977); *State v. Southwest Lumber Mills, Inc.*, 297 P.2d 1099 (Ariz. 1956).

Connecticut: *McMurty v. State*, 151 A. 252 (Conn. 1930).

Florida: *City of Opa-Locka v. Buckress Land Co.*, 247 So.2d 339 (Fla. Dist. Ct. App. 1971).

Idaho: *County of Ada v. Red Steer Drive-Ins,* 609 P.2d 161 (Idaho 1980).

Indiana: *Dept. of Revenue v. American Motorists' Ins. Co.*, 396 N.E.2d 907 (Ind. Ct. App. 1979); *Metropolitan Life Ins. v. State*, 144 N.E. 420 (Ind. 1924).

Massachusetts: *Boot Cotton Mills v. Lowell*, 34 N.E. 367 (Mass. 1893).

Michigan: *Ford Motor Co. v. City of Detroit*, 204 N.W.2d 348 (Mich. 1972); *Standard Oil Co. v. State*, 276 N.W. 908 (Mich. 1937).

Montana: *Williams v. Harvey*, 6 P.2d 418 (Mont. 1931).

New York: *In re O'Berry*, 72 N.E. 109 (N.Y. 1904).

South Dakota: *Chicago, S.P., M.&O. Ry. v. Mundt*, 229 N.W. 394 (S.D. 1930).

such decisions rest on notions of fair play and equity. *See, e.g., County of Ada v. Red Steer Drive-Ins,* 609 P.2d 161, 167 (Idaho 1980) ("it would be inequitable to create a special status for the State or its subdivisions whereby the county could avoid the payment of interest, but where private parties would be required to make such payments"); *Sims v. White*, 522 So.2d 239, 241 (Ala. 1988) ("equity and fairness dictate that state prejudgment interest rule also should apply to refund of excess property taxes"). Other courts have noted constitutional concerns. *See In re O'Berry*, 72 N.E. 109, 112 (N.Y. 1904) (interest must be paid because "to the extent of the [excess tax] so received, the public burdens upon others were diminished, and so the public, represented by the state, have had the use and benefit of the money").

Despite this authority, a slight majority of State courts, including the one below, have held that a State may retain interest earned on unconstitutional or illegal taxes paid

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Nevada: *Washow Investment, Inc. v. State*, 532 P.2d 265 (Nev. 1975).

Washington: *Lone Star Cement Corp. v. City of Seattle*, 429 P.2d 909 (Wash. 1967).

Federal: *Erskine v. Van Arsdale*, 82 U.S. (15 Wall.) 75 (1872); *New York Life Ins. v. Anderson*, 263 F. 527 (2d Cir. 1920); *International Paper Co. v. Burrill*, 260 F. 664 (D. Mass. 1919).

involuntarily.[6] These courts have inferred "that the silence of

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[6] State courts in 23 jurisdictions in addition to Vermont have held that interest is not available on tax refunds absent a statute requiring it:

California: *Maurice L. Bein, Inc. v. Housing Authority*, 321 P.2d 753 (Calif. 1958); *Ball v. County of Los Angeles*, 147 Cal. Rptr. 252, 82 Cal. App. 3rd 312 (1978), *cert. den.* 439 U.S. 1116 (1979).

Colorado: *Antero & Lost Park Reservoir Co. v. Park County*, 225 P. 269 (Colo. 1924).

Connecticut: *Marsh v. Brown*, 325 A.2d 466 (Conn. 1974).

Florida: *In re Four-Fifty-Two-Thirty Corp.*, 322 So.2d 525 (Fla. 1975).

Illinois: *Lakefront Realty Corp. v. Lorenz*, 167 N.E. 2d 236 (Ill. 1960).

Iowa: *Crown Concrete Co. v. Conkling*, 75 N.W. 2d 351 (Iowa 1956).

Kansas: *Kittredge v. Boyd*, 20 P.2d 811 (Kan. 1933).

Kentucky: *Commonwealth of Kentucky v. Kentucky Gas Service*, 286 S.W.2d 911 (Ky. 1956).

Maryland: *Lady v. Prince George's County*, 403 A.2d 1277 (Md. 1979).

Mississippi: *Gulf of M.&O. Ry. v. Webster County*, 13 So.2d 644 (Miss. 1943).

Missouri: *Ellsworth Freight Lines, Inc. v. State Tax Comm.*, 651 S.W. 2d 130 (Mo. 1983), *cert. denied*, 465 U.S. 1001 (1984).

New Hampshire: *Kaemmerling v. State*, 128 A. 6 (N.H. 1924).

New Jersey: *General Electric Co. v. Passaic*, 138 A.2d 545 (N.J. 1958).

North Carolina: *Cannon v. Maxwell*, 171 S.E. 624 (N.C. 1933).

North Dakota: *Ford Motor Co. v. Baker*, 300 N.W. 435 (N.D. 1941).

Ohio: *Cleveland Concession Co. v. Peck*, 117 N.E.2d 429 (Ohio 1954); *Cincinnati v. Cincinnati S.Ry.*, 187 N.E. 312 (Ohio 1933).

Oklahoma: *Eaton v. St. Louis S.F. Ry.*, 251 P. 1032 (Okla. 1925).

Rhode Island: *Daniels Tobacco Co. v. Norberg*, 335 A.2d 636 (R.I. 1975).

Puerto Rico: *Fajardo Sugar Co. v. Richardson*, 7 P.R.R. 154 (P.R. 1914).

South Carolina: *Colonial Life and Accident Ins. v.*

[a] refund statute on the question of interest discloses a legislative intention to deny it." *Lakefront Realty Corp. v. Lorenz,* 167 N.E.2d 236, 240-41 (Ill. 1960). In addition, the State Court below and the Supreme Courts of Oregon and Ohio have each expressly held that there is no constitutional constraint on denying interest. *See Christensen*, App. 1a; *Pendell*, 847 P.2d at 850-51; *Chicago Freight*, 584 N.E.2d at 694-95.

II. LOWER COURT RULINGS DENYING INTEREST ON ILLEGAL TAXES PAID UNDER DURESS APPEAR TO CONFLICT WITH THIS COURT'S DECISIONS IN *McKESSON* AND *WEBB'S FABULOUS PHARMACIES.*

Those cases which deny interest on the refund of unconstitutional taxes paid involuntarily are difficult to square with recent decisions by this Court under the Due Process and

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South Carolina Ins. Comm. 103 S.E.2d 908 (S.C. 1958).

Tennessee: *New England Mutual Life v. Reece*, 83 S.W.2d 238 (Tenn. 1935).

Virginia: *Railway Express Agency v. Virginia*, 87 S.E. 2d.188 (Va. 1955).

Wisconsin: *Holton and Hunkel Greenhouse Co. v. State*, 80 N.W.2d 371 (Wis. 1957).

Wyoming: *In re Black*, 775 P.2d 484 (Wyo. 1989).

Just Compensation Clauses. In *McKesson*, this Court held, as a matter of due process, that where a State compels payment of a state tax and does not provide a pre-deprivation remedy, it must furnish relief which restores the *status quo ante*. *See* 496 U.S. at 42. Otherwise stated, a State may not turn its failure to provide a pre-deprivation remedy to its own advantage. In *McKesson*, which struck down a discriminatory tax on Commerce Clause grounds, this Court made clear that the State must provide a "clear and certain" remedy which would place the taxpayer in the position it "should have occupied absent any Commerce Clause violation." *Id.*

A tax refund without interest fails to accomplish that result. In this case, as in *McKesson*, the tax in dispute was held to violate the Commerce Clause. Had the State of Vermont provided a means of challenging the tax in advance, Petitioners never would have had to pay it. A refund of principal many years after payment was compelled leaves the Petitioners worse off than they would have been absent the Commerce Clause violation, because they have been deprived of the use of their funds. Nor is the sum trivial: in the case of both Petitioners it comes to more than half of the principal amount.[7] Multiplied by the many thousands of class members who were forced to pay the unconstitutional tax, the sum runs into millions of

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[7] The State of Vermont had the use of Petitioner Christensen's funds for nine years and Petitioner Pankey's for eight. At six percent per annum, compounded annually, Mr. Christensen's funds would have increased by almost 70 percent and Mr. Pankey's by almost 60.

dollars.[8] A remedy which ignores the Petitioners' loss of use of their property does not satisfy due process. *See Bonner v. Coughlin*, 517 F.2d 1311, 1312-14 (7th Cir. 1975) (Stevens, J.), *modified en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978) (state law remedy must include "compensation for *use* as well as the value of the property" under Due Process Clause).

The State's retention of interest on unconstitutional taxes paid involuntarily also offends the Just Compensation Clause. This Court's decision in *Webb's Fabulous Pharmacies* confirms that the Clause requires a State to pay interest on funds which it has retained but is later obligated to return. In *Webb's*, Seminole County in Florida had earned interest on funds which were deposited in the county court pursuant to a state interpleader statue. *Id.* at 158-59. Although the county later refunded the principal, it refused to part with the interest. In holding that the county's action violated the Fifth and Fourteenth Amendments, this Court emphasized that "the exaction is a forced contribution to general governmental revenues." As it said:

> . . . a State, by ipse dixit, may not transform private property into public property without compensation,

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[8] The State has estimated that it collected about $1 million annually from new residents paying the motor vehicle tax. App. 32a. Over the 13-year period the tax was collected, the tax fund would have earned more than $3 million in interest if invested at six percent, compounded annually.

> even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

449 U.S. at 164.

The decision in *Webb's* would seem dispositive in this case. Like the plaintiff in *Webb's*, the Petitioners here also made "a forced contribution to general governmental revenues." That contribution became part of the State of Vermont's Transportation Fund. Vt. Stat. Ann. tit. 32, § 8912 (1991). It was either invested or used for operational costs and highway projects, thus avoiding the cost of borrowing. *See* Vt. Stat. Ann. tit. 19, § 12 (1987). It would appear that the Petitioners and other class members are entitled to compensation based on *Webb's*.

III. THE DECISION BELOW IS UNPERSUASIVE AS A MATTER OF LAW AND DISTURBING AS A MATTER OF POLICY.

The Vermont Supreme Court held below that the Petitioners' federal constitutional claims for interest on their tax refunds failed to state a cause of action. *See* App. 1a.[9] It did

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[9] As in the federal courts, judgment on the pleadings may not be granted unless it appears beyond doubt that there

not question that the Petitioners and others in their class had been forced to pay the motor vehicle tax under threat of civil and criminal penalties, with no possibility of pre-deprivation review.[10] Nor did it take issue with two other facts which Petitioners would expect to prove on remand: 1) that the State actually did earn investment income on Petitioners' tax receipts, because the Transportation Fund in which the funds were kept consistently showed a surplus and was invested during the relevant years; and 2) besides retaining interest, the State received an additional windfall of millions of dollars from the illegal tax, because numerous individuals failed to file timely refund applications. *See* App. 33a.

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exists no circumstances or facts which would entitle the plaintiff to relief. V.R.Civ.P. 12(c). All facts asserted by the plaintiff must be assumed to be true, and all inferences drawn in his or her favor.

[10] Individuals who do not pay the motor vehicle tax "as provided" are subject to an additional one percent tax or $150 payment, whichever is smaller. Vt. Stat. Ann. tit. 32, § 8905(c) (1991). Such individuals also face a driver's license suspension and may be fined $500 for "attempt[ing] to evade" the tax. Vt. Stat. Ann. tit. 32, §§ 8909-10 (1991). Interest at the rate of 18 percent annum is charged on late payments, together with a penalty of five percent for each month payment is overdue, to a maximum of 25 percent. Vt. Stat. Ann. tit. 32, § 8920(b) (1991). Finally, of course, those who do not pay the tax may not register their cars, Vt. Stat. Ann. tit. 32, § 8905, and unregistered vehicles may not be driven. *See* Vt. Stat. Ann. tit. 23, §§ 301, 2302 (1987).

Although the State Supreme Court did not disagree that the Petitioners had not been restored to "the position they would have been in absent a Commerce Clause violation," it nonetheless held that they had stated no due process claim. App. 3a-4a. The Vermont Court merely stated that *McKesson* did not expressly decide the issue of interest, and it declined to "extend" the ruling. *Id.* The lower court's decision contains no other constitutional reasoning or analysis.[11] It suggests that the Vermont Supreme Court will consider itself bound only by this Court's explicit holdings, not by the constitutional principles which it announces. Such an approach has been criticized as

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[11] In a concurrence, two state court justices concluded that interest need not be paid under the Due Process Clause because of the "flexible remedy" endorsed by *McKesson*. App. 7a. A similar rationale was adopted by the Oregon Supreme Court in *Pendell*. *See* 847 P.2d at 850. However, the "flexibility" approved by *McKesson* relates only to choice of remedy and procedural matters, such as statutes of limitations and administrative review. *McKesson*, 496 U.S. at 50-52. *McKesson* makes clear that a State may not undercut the minimum substantive requirement that taxpayers who meet procedural prerequisites be restored to the position they would have been in but for the constitutional violation. *Id.* at 51-52 ("The State is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined"). *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (post-deprivation procedure must "make complainant whole"); *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978).

inappropriate in our constitutional system. *See* Antonin Scalia, *The Rule of Law as a Law of Rule*, 56 U.Chi.L.Rev. 1175, 1177 (Fall 1989).

The State Court's conclusion with respect to the Just Compensation Clause is equally unconvincing. The Court held that that Clause did not apply because the State's use of taxpayer funds was not sufficiently "extreme or burdensome." App. 3a. But where, as here, the State had actual possession of the tax funds for many years and Petitioners were completely deprived of their use, the issue of burdensomeness should not even arise. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (any physical taking suffices to trigger Fifth Amendment protection); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (deprivation of all economic use of property constitutes taking).[12] Certainly, it was not a consideration in *Webb's*, a case which the State Court distinguished only on the ground that it did not involve "failure to pay interest on a tax refund." App. 3a.[13]

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[12] Moreover, Petitioners would contend that the State's use of the funds was "burdensome and extreme," because it cost them more than 50 percent of the value of their tax refunds. *See* note 7, *supra*. If the point is relevant as a factual matter, it should not have been decided against Petitioners on a motion to dismiss.

[13] The concurrence stated that Petitioners' reliance on *Webb's* was "fundamentally misplaced" because the interpleader fund there was "concededly private," whereas the Vermont motor vehicle tax was "levied by the State for public purposes." App. 9a. However, it is not evident why

The decision below is troubling not only because it denies Petitioners an adequate remedy, but also because it creates a perverse incentive for States to enact unconstitutional taxes. If the decision stands, States would be able to earn significant investment income by imposing politically expedient taxes, even if, as here, they were eventually forced to refund the principal after years of litigation. As this Court has recognized, one important function of a constitutional remedy is to furnish an incentive for States and State officials to respect constitutional requirements. *See, e.g., Owen v. City of Independence*, 445 U.S. 622, 651-52 (1980) (discussing deterrent effect of imposing civil rights damages on municipalities); *Miranda v. Arizona*, 384 U.S. 436 (1966). Commentators have made the same point. *See, e.g.,* Richard H. Fallon and Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1733 (June 1991). Unfortunately, Vermont and certain other States have shown a proclivity for collecting unconstitutional taxes even after their

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the Petitioners, who were forced to pay an illegal tax, should not be entitled to the same Fifth Amendment protection as the litigant in *Webb's*, who voluntarily paid a fund into court pursuant to a valid interpleader statute. The Just Compensation Clause has always been thought to protect citizens forced to give up property for public purposes. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("Fifth Amendment's guarantee . . . was designed to bar government from *forcing* some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

flaws are pointed out, while at the same time seeking to limit taxpayer remedies.[14]

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[14] The State of Vermont here continued to exact the motor vehicle tax for more than nine years after this Court found in *Williams* that it violated the Equal Protection Clause on its face. 472 U.S. at 15 (failure to grant tax credit to non-residents "denies them the equal protection of the laws"). The Second Circuit called taxpayer efforts to secure a remedy "a protracted saga." *Barringer' I,* 964 F.2d at 1280, 1284 (2d Cir. 1992). Collection was stopped only when the Second Circuit held that the tax violated the Commerce Clause and this Court denied certiorari. *See Barringer II*, 1 F.3d at 1335-39 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 879 (1994).

Vermont also repeatedly enacted unconstitutional taxes on out-of-state truckers, passing new ones as rapidly as old ones were struck down. *See American Trucking Ass'ns v. Conway* ("*ATA I*"), 508 A.2d 405 (Vt. 1986), *cert. denied*, 483 U.S. 1020 (1987) (striking down truck trip and entry fees); *American Trucking Ass'ns v. Conway* ("*ATA II*"), 508 A.2d 408 (Vt. 1986), *cert. denied*, 483 U.S. 1019 (1987) (striking down truck flat tax); *American Trucking Ass'ns v. Conway* ("*ATA III*"), 566 A.2d 1323 (Vt. 1989) (striking down entry fee on trucks from states imposing "third tier" taxes). Throughout the *ATA* litigation and most of the motor vehicle tax cases, the State Supreme Court held that refunds of unconstitutional taxes were barred by sovereign immunity. *See American Trucking II*, 508 A.2d at 413-14. It changed its position to require retroactive relief only after this Court's decision in *McKesson*. *See Williams II*, 156 Vt. at 52.

Other States which have shown a reluctance to conform state taxes to constitutional norms include Arkansas

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

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March 1997

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and Florida. Arkansas enacted a Highway Use Equalization Tax in 1983 which discriminated against out-of-state truckers, and it persisted in enforcing the tax even after this Court struck down a virtually identical Pennsylvania levy in *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987). *See American Trucking Ass'ns v. Smith*, 496 U.S. 167, 171-76 (1990). It stopped only after Justice Blackmun, sitting as Circuit Justice, ordered injunctive relief. *See* 483 U.S. at 1310. Florida continued to collect a liquor excise tax favoring local producers after a similar Hawaiian tax was stricken on Commerce Clause grounds in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). Following *Bacchus,* the Florida legislature amended the tax statute, deleting the word "Florida" and instead inserting language which described liquor products made only in Florida. *See McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18, 22-23 (1990). Like Vermont, both the Arkansas and Florida Supreme Courts had held that refunds of unconstitutional taxes were not available. *See Smith,* 496 U.S. at 174; *McKesson*, 496 U.S. at 25-26.

Nos. 95-293 & 95-294

In re Petitions of Norman Williams and Susan Letourneau

Supreme Court

On Appeal from
Chittenden Superior Court

March Term, 1996

Thor Christensen, et al.

v.

Michael D. Griffes, Commissioner of Motor Vehicles

Linda Levitt, J.

Norman Williams of Gravel and Shea, Burlington, for plaintiffs-appellants

Jeffrey L. Amestoy, Attorney General, William E. Griffin, Chief Assistant Attorney General, and Thomas R. Viall, Assistant Attorney General, Montpelier, for defendant-appellee

PRESENT: Allen, C.J., Gibson, Dooley, Morse and Johnson, JJ.

GIBSON, J. Taxpayers appeal from a judgment in these consolidated class actions in which the superior court concluded that taxpayers are not entitled to interest on tax refunds paid by the Department of Motor Vehicles. They argue that the Fifth Amendment Just Compensation Clause and the Fourteenth Amendment Due Process Clause require payment of interest on the wrongfully collected taxes. We affirm.

In Barringer v. Griffes, I F.3d 1331, 1339 (2d Cir. 1993), cert. denied, 510 U.S. 1072 (1994), the United States Court of Appeals for the Second Circuit held that Vermont's motor vehicle

purchase and use tax, which provided a credit for sales tax paid to Vermont but not for sales tax paid to other states, violated the Commerce Clause of the United States Constitution. In response, the Vermont Legislature passed Act No. 223, which requires the Commissioner of Motor Vehicles to refund any use tax collected after August 31, 1980, where the claimant requests the refund in writing with proof of payment of sales or use tax in another state. The Act specifically states that the tax shall be refunded "without interest." 1993, No. 223 (Adj. Sess.), § 3. Taxpayers received refunds but claim they are also entitled to interest.*****

The Fifth Amendment Just Compensation Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. Taxpayers rely on Henderson Bridge Co. v. Henderson City, 173 U.S. 592, 614-15 (1899), arguing that the United States Supreme Court explicitly recognizes that the Just Compensation Clause applies to taxes illegally collected. In Henderson, the Court rejected the defendant's contention that municipal taxation of a bridge that did not receive any benefits from the municipality amounted to a taking of private property without just compensation. The Court noted, however, that "[i]t is conceivable that taxation may be of such a nature and so burdensome as properly to be characterized a taking." Id. at 614; see also Acker v. Commissioner of Internal Revenue, 258 F.2d 568, 575 (6th Cir. 1958) (income tax rates, although high, have not reached confiscation or "taking in constitutional sense"; taxpayers' concerns must be addressed to Congress, not courts), aff'd, 361 U.S. 87 (1959).

Although it is "conceivable" that in extreme cases a tax may rise to the level of a taking, we cannot find the interest at issue here so extreme or burdensome as to bring a taxation claim within the proscription of the Fifth Amendment. See Pendell v. Department of Revenue, 847 P.2d 846, 849-50 (Or. 1993)

***** Earlier history of this case is detailed in Williams v. State, 156 Vt. 42, 44-47, 589 A.2d 840, 842-43 (1990).

(taxpayers challenge government's power to tax, not power of eminent domain, where they sought interest on income tax refunds). Indeed, taxpayers have cited no case in which a tax, or the interest on a tax, is held to be a taking.

Instead, taxpayers rely on Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) and United States v. $277.000 U.S. Currency, 69 F.3d 1491 (9th Cir. 1995). In Webb's, the United States Supreme Court held that the county violated the Fifth Amendment by retaining the interest on an interpleader fund, where the county also retained a clerk's fee for services rendered. 449 U.S. at 164-65. In $277,000, the Court of Appeals for the Ninth Circuit held that, where the government has actually or constructively earned interest on cash it seized in a forfeiture action, it must disgorge the interest along with the money it is required to return. 69 F.3d at 1498. Neither case asserts taxpayers' position that failure to pay interest on a tax refund amounts to a taking. Indeed, the holding in $277,000 is based on a previous order of the trial court, not the Just Compensation Clause. See id. at 1496.

Taxpayers also argue that the Commissioner is obligated to pay interest on the tax refunds under the Due Process Clause of the Fourteenth Amendment. They rely on McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990), which held that "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation. " Id. at 31 (footnote omitted). Applying this principle in McKesson, the Court ruled that "Florida may satisfy this obligation through any form of relief, ranging from a refund of the excess taxes paid by petitioner to an offsetting charge to previously favored distributors, that will cure any unconstitutional discrimination against interstate commerce during the contested tax period." Id. at 51.

Taxpayers contend that, under McKesson, the State is required to provide relief that will put taxpayers in the position they would have been in absent a Commerce Clause violation. Because taxpayers have been deprived of the use of their funds

during the years it has taken to obtain the refund, taxpayers maintain that the Commissioner must pay them interest. As taxpayers acknowledge, however, McKesson did not address the issue of interest on tax refunds. Moreover, no court has extended McKesson to require a state to pay such interest. Cf. Chicago Freight Car Leasing Co. v. Limbach, 584 N.E.2d 690, 694-95 (Ohio 1992) (McKesson "did not rule that the state's failure to pay interest on refunds of illegally collected taxes is a denial of due process"); Pendell, 847 P.2d at 850 ("lack of interest on refunds of taxes that were imposed by laws that this court invalidates does not violate taxpayers' due process rights under McKesson"). Consequently, we decline to extend McKesson to require payment of interest on tax refunds.

Finally, taxpayers argue that this Court should order the Commissioner to pay interest on the tax refunds as a matter of state law under 32 V.S.A. § 8914 and V.R.C.P. 54(a). Section 8914 provides, "Any overpayment of [the purchase and use] tax as determined by the commissioner shall be refunded." The statute is silent with respect to interest; accordingly, no interest is due on the refunds. See Library of Congress v. Shaw, 478 U.S. 310, 317 (1986) (apart from constitutional requirements, in absence of specific provision by contract or statute, or express consent by Congress, interest does not run on claim against United States); LaShay v. Department of Social and Rehab. Servs., 160 Vt. 60, 67, 625 A.2d 224, 228 (1993) (sovereign immunity protects state from suit unless immunity expressly waived by statute). Nor does V.R.C.P. 54(a) ("the amount of the judgment shall include the principal amount found to be due, [and] all interest accrued") require the state to pay interest absent an express waiver of immunity by the Legislature.

In view of the express intent of the Legislature that the Commissioner refund the motor vehicle use tax "without interest,"

1993, No. 223 (Adj. Sess.), § 3, and absent any constitutional requirement for interest, the superior court correctly ruled that taxpayers are not entitled to interest on their tax refunds. Affirmed.

FOR THE COURT:

/s/ Ernest W. Gibson
Associate Justice

Nos. 95-293 & 95-294

In re Petitions of Norman Williams and Susan Letourneau

Supreme Court

On Appeal from
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March Term, 1996

Thor Christensen, et al.

v.

Michael D. Griffes, Commissioner of Motor Vehicles

Linda Levitt, J.

Norman Williams of Gravel and Shea, Burlington, for plaintiffs-appellants

Jeffrey L. Amestoy, Attorney General, William E. Griffin, Chief Assistant Attorney General, and Thomas R. Viall, Assistant Attorney General, Montpelier, for defendant-appellee

PRESENT: Allen, C.J., Gibson, Dooley, Morse and Johnson, JJ.

MORSE, J., concurring. I concur in the Court's holding, but write separately to offer what I believe is the rationale for its ruling.

In McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990), the United States Supreme Court held that "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." Id. at 31 (footnote omitted). Thus, where Florida -- in violation of the Commerce Clause -- had applied preferential tax rates on locally grown agricultural crops, due process required that it provide a "clear

and certain remedy" for the unlawful tax. Id. at 39 (quoting Atchison, T. & S. F. R. Co. v. O'Connor, 223 U.S. 280, 285 (1912)). McKesson did not expressly consider whether that "remedy" required interest on tax refunds. But McKesson was not altogether silent on the subject of a state's obligation to provide relief for erroneous taxes, and its observations on this score strongly support the Legislature's decision here to refund the unlawful use tax without interest.

While firm in its decision that an unlawful tax required a "clear and certain remedy," the McKesson court was equally clear that states retained considerable discretion in determining the exact nature and scope of the remedy to be provided. "[A] State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination," it observed. Id. at 39-40. Thus, Florida could satisfy its remedial obligation "through any form of relief, ranging from a refund of the excess taxes paid by petitioner to an offsetting charge to previously favored distributors, that will cure any unconstitutional discrimination." Id. at 51.

The high court further observed that "state interests traditionally have played, and may play, some role in shaping the contours of the relief that the State must provide to illegally or erroneously deprived taxpayers." Id. at 50 (emphasis added). "Financial stability" and "sound fiscal planning" were the primary state interests identified by the Court as playing a legitimate role in "shaping the contours" of the relief provided. Id. Allowing refunds only to those who pay under protest and enacting short statutes of limitations applicable to refund actions were among the specific measures endorsed by the Court to mitigate the disruptive consequences of a tax invalidation. Id. Such procedural limitations, the Court explained, "would sufficiently protect States' fiscal security when weighed against their obligation to provide meaningful relief for their unconstitutional taxation." Id. The potentially confiscatory effect on the state's general fund also represented a legitimate state interest in shaping the contours of relief. "'[C]onserving scarce fiscal and administrative resources is a factor that must be weighed' when

determining [the] precise contours of [the] process due." Id. at 51 (quoting Mathews v. Eldridge, 424 U.S. 319, 348 (1976)). A state's choice of relief might, for example, "entail various administrative costs (apart from the 'cost' of any refund itself)," and a state "may, of course, consider such costs when choosing" among the remedial options available. Id. at 50-51.

Considered in the light of these principles, the Legislature's decision to refund the vehicle use tax without interest typifies the kind of measured relief -- achieved through a balancing of state and individual taxpayer interests -- expressly endorsed in McKesson. The refund satisfied the constitutional mandate of a clear and certain remedy. The decision to limit the relief afforded by declining to pay interest was equally legitimate as a means of "conserving scarce fiscal and administrative resources." Id. at 51. As McKesson recognized, a state retains broad flexibility to shape the remedy provided in the light of fiscal reality; it need not blindly sacrifice the interest of the taxpaying public to the desires of a relative few aggrieved taxpayers. A refund of previously collected tax revenues places a particular strain upon the public fisc, not to mention the added cost of administering a tax refund program. The State here could thus validly determine to refund the collected taxes but spare the public the additional burden of interest on the refunds. Indeed, although not specifically denominated as such, the interest withheld by the State may constructively be thought of as a charge to recoup part of the costs of administration. "The State may, of course, consider such costs when choosing [among] the various avenues of relief open to it." Id.

Taxpayers' additional claim that the withholding of interest upon the tax refunds represents an unconstitutional "taking" under the Fifth Amendment is equally without merit. As noted, the Supreme Court has explicitly sanctioned certain state procedural mechanisms, such as payment-under-protest provisions and short statutes of limitations, that "could independently bar the taxpayers' refund claim." Reynoldsville Casket Co. v. Hyde, 115 S.Ct. 1745, 1750 (1995); see McKesson, 496 U.S. at 45. It strains logic and credibility to conclude that the Supreme Court

would expressly approve procedural provisions barring tax refunds altogether and simultaneously hold that the Fifth Amendment independently requires payment of accrued interest on the refunds.

Furthermore, recent takings jurisprudence makes clear that a violation of the Fifth Amendment requires a denial of "all economically beneficial uses" of the owner's property. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992). Although the Supreme Court has recognized the theoretical possibility that a tax may be "so burdensome as properly to be characterized a taking," Henderson Bridge Co. v. Henderson City, 173 U.S. 592, 614 (1899), the withholding of interest on taxes subsequently held to be invalid does not begin to rise to the level of economic deprivation contemplated by the high court.

Finally, taxpayers' reliance on Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) and United States v. $277,000 U.S. Currency, 69 F.3d 1491 (9th Cir. 1995) is fundamentally misplaced. In Webb's, the Court held that the State's withholding of interest on private funds deposited in court in an interpleader action was an unconstitutional taking. The Court explained that its holding was grounded in the "narrow circumstances of this case," 449 U.S. at 164, to wit, that a separate statute authorized a fee for services rendered based upon the amount of the principal deposited, that the "deposited fund itself concededly is private," id., and that "[t]he usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." Id. at 162. The circumstances here are totally dissimilar, involving not "concededly private" funds earmarked for ultimate redistribution to the private parties in the interpleader action before the court, but tax revenues levied by the State for public purposes.

The other case cited by taxpayers, United States v. $277,000 U.S. Currency, is even less apposite. There the court held that the claimant was entitled to interest on certain cash seized in a drug raid, not because its retention constituted a taking, but rather because the court had specifically ordered the money to be held in an interest-bearing account, and because of

the government's prior handling of similar funds. 69 F.3d at 1494. "Such [interest], in accordance with the judge's order and past practice, become part of the res, to be returned with the res to the claimant." Id. at 1496. No aspect of the court's decision purported to be based upon the constitutional requirement of just compensation.

For all of the foregoing reasons, therefore, I concur in the judgment. I am authorized to say that Justice Dooley joins in this concurrence.

/s/ James L. Morse
Associate Justice

September 2, 1993

Mr. Michael D. Griffes
Commissioner
Vermont Department of Motor Vehicles
120 State Street
Montpelier, VT 05602

Dear Mr. Griffes:

We are writing on behalf of Mr. Thor Christensen to request a motor vehicle purchase and use tax refund under 32 V.S.A. § 8914, together with interest. Mr. Christensen paid the tax on a 1985 Dodge Caravan and a 1997 Jeep C-J, despite already having paid sales tax to Indiana when the vehicles were purchased. As the Second Circuit said in Barringer v. Griffes, No. 92-9062 (filed August 9, 1993), the tax violates the Commerce Clause of the Federal Constitution.

Thank you very much for your consideration.

Very truly yours,

Norman Williams
GRAVEL AND SHEA

Jerome F. O'Neill
O'NEILL & CRAWFORD

NW:wxb
cc: Mr. Thor Christensen

September 2, 1993

Mr. Michael D. Griffes
Commissioner
Vermont Department of Motor Vehicles
120 State Street
Montpelier, VT 05602

Dear Mr. Griffes:

We are writing on behalf of Mr. Joseph W. Pankey Jr. to request a motor vehicle purchase and use tax refund under 32 V.S.A. § 8914, together with interest. Mr. Pankey paid the tax on a 1980 Pontiac Phoenix and 1982 Chevrolet Pickup, despite already having paid sales tax to Louisiana when the vehicles were purchased. As the Second Circuit said in Barringer v. Griffes, No. 92-9062 (filed August 9, 1993), the tax violates the Commerce Clause of the Federal Constitution.

Thank you very much for your consideration.

Very truly yours,

Norman Williams
GRAVEL AND SHEA

Jerome F. O'Neill
O'NEILL & CRAWFORD

NW:wxb
cc: Mr. Joseph W. Pankey Jr.

STATE OF VERMONT CHITTENDEN SUPERIOR COURT

CHITTENDEN COUNTY, SS. DOCKET NO. S0117-94 CnC

THOR CHRISTENSEN and)
JOSEPH WOODROW PANKEY, JR.,)
Plaintiffs,)
)
v.)
)
MICHAEL D. GRIFFES,)
Commissioner of Motor Vehicles,)
Defendant.)

CLASS-ACTION COMPLAINT

Plaintiffs, by their attorneys, Gravel and Shea and O'Neill & Crawford, P.C., complain of the Defendant and allege as follows:

PRELIMINARY STATEMENT

1. This class action is brought to recover taxes collected from Plaintiffs as a class by Defendant and his predecessors in violation of the Constitution of the United States. This action seeks a writ of mandamus requiring Defendant to provide tax refunds, together with interest at the legal rate, pursuant to 32 V.S.A. § 8914 and the Federal Constitution.

PARTIES

2. Plaintiff Thor Christensen is a resident of Brookfield, Vermont. Mr. Christensen moved to Vermont from Indiana in December, 1985.

3. Plaintiff Joseph Woodrow Pankey, Jr., is a professor at the University of Vermont and a resident of Charlotte, Vermont. Mr. Pankey moved to Vermont from Louisiana in June, 1984.

4. Defendant Michael D. Griffes is Commissioner of the Department of Motor Vehicles for the State of Vermont. Defendant Griffes is authorized under 32 V.S.A. § 8901 to administer the Motor Vehicle Purchase and Use Tax imposed by 32 V.S.A. § 8903 and is obligated by the federal Constitution to provide a refund of taxes which the Vermont Department of Motor Vehicles has collected in violation of the Constitution. Although both Mr. Christensen and Mr. Pankey have requested refunds under 32 V.S.A. § 8914, Defendant has failed to provide them.

CLASS ACTION

5. Plaintiffs bring this action pursuant to Rule 23, V.R.Civ.P., on behalf of themselves and all other individuals who have paid the Motor Vehicle Purchase and Use Tax on motor vehicles purchased and registered in other states, without receiving a credit for sales taxes paid in such states.

6. Subclass A consists of all individuals described in paragraph 5 above who have requested refunds from the Defendant, but which the Defendant has failed to provide. Subclass B consists of all individuals described in paragraph 5, above, who have not requested such refunds.

7. The prerequisites for a class action are satisfied in that:

a. According to the State's own estimate, the number of persons who have paid the Motor Vehicle Purchase and Use Tax without receiving a credit for sales taxes paid in other states exceeds 20,000. The number of individuals in Subclass A exceeds 350. In either case, the

number is sufficiently large so as to render joinder impracticable.

b. The factual and legal issues in this action, namely the obligation of the Defendant to provide tax refunds and interest, are common to all class members.

c. The claims of the representative Plaintiffs are typical of the claims of the members of the class.

d. The named Plaintiffs will fairly and adequately protect the interests of the class.

8. A class action is proper under Rule 23(b)(1), V.R.Civ.P., because the prosecution of separate actions by individual members of the class would create a risk of:

i. inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

ii. adjudications with respect to individual members of the class would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or would substantially impair their ability to protect their interests.

9. A class action under Rule 23(b)(3), V.R.Civ.P., is also appropriate because:

i. The issue as to whether Defendant is obligated to provide refunds in connection with the collection of the Motor Vehicle Purchase and Use Taxes predominates over any questions which may affect only individual members;

ii. A class action is superior to other methods for the fair and efficient adjudication of this controversy. Each claim in and of itself is relatively minor, so that it is not realistic for members of the class to bring separate actions. Moreover, separate actions would greatly burden the Defendant and the Court. The management of this class action would not create serious difficulty, since the tax refund amounts due are stated in Defendant's own records, the interest amounts may be easily calculated, and no antagonism exists among the class members; and

iii. The Plaintiffs will fairly and adequately represent the interests of the class and the individual class members. By reason of the identity of the claims of the individual Plaintiffs and class members, the successful assertion of Plaintiffs' claims herein will necessarily establish determinations of fact and law adequate to prove the liability of Defendant to each class member.

FACTUAL ALLEGATIONS

Plaintiff Thor Christensen

10. In November, 1984, and while a resident of Indiana, Plaintiff Thor Christensen purchased a 1985 Dodge Caravan for $13,629.85 in Rochester, Indiana. He also purchased a 1979 C-J Jeep in September, 1985, for $3,500 in Kokomo, Indiana.

11. At the time he purchased both vehicles, Plaintiff Christensen paid five percent Indiana sales tax, or $681.49 on the Dodge Caravan and $175.00 on the C-J Jeep.

12. In February, 1986, Plaintiff registered the vehicles in Vermont.

13. At the time of registration, Plaintiff Christensen was required to pay an additional four percent Vermont Purchase and Use Tax on the value of the vehicles in order to obtain a Vermont registration, or $366.00 on the Dodge Caravan and $80.00 on the Jeep, with no credit for taxes paid to Indiana.

14. In addition to the vehicles described in paragraph 10 above, in September, 1979, and while a resident of the State of Washington, Plaintiff Christensen purchased a 1979 Chevrolet Suburban for $9,705.00 in Seattle, Washington.

15. At the time of purchase, Plaintiff Christensen paid a 7.5 percent sales tax to Washington on the vehicle, or $485.25.

16. Plaintiff Christensen paid a use tax of $98.00 on the 1979 Chevrolet Suburban in Vermont.

17. On September 2, 1993, Plaintiff Christensen requested a refund with interest from Defendant in accordance with 32 V.S.A. § 8914. Defendant has so far failed to provide such refund.

Plaintiff Joseph Woodrow Pankey, Jr.

18. On October 20, 1980, and while a resident of Louisiana, Plaintiff Pankey purchased a 1980 Pontiac Phoenix in Homer, Louisiana, for $8,167.32.

19. Plaintiff Pankey paid sales tax to Louisiana of three percent, or $247.46, on the purchase price of the car.

20. On September 28, 1984, Plaintiff Pankey registered his car in Vermont.

21. At the time of registration, Plaintiff Pankey was required to pay an additional four percent Vermont Purchase and

Use Tax in the amount of $158.00 in order to obtain a Vermont registration, with no credit for the taxes paid to Louisiana.

22. On June 14, 1982, also while a resident of Louisiana, Plaintiff Pankey purchased a 1982 Chevrolet pickup truck in Bernice, Louisiana for $14,728.68.

23. On December 4, 1984, Plaintiff Pankey registered that vehicle in Vermont.

24. At the time of registration, Plaintiff Pankey was required to pay an additional four percent Vermont Purchase and Use Tax in the amount of $297.90 in order to obtain a Vermont registration, with no credit for the taxes paid to Louisiana.

25. On September 2, 1993, Plaintiff Pankey requested a refund with interest from Defendant in accordance with 32 V.S.A. § 8914. Defendant has so far failed to provide such refund.

LEGAL CLAIM

26. Payment of the Motor Vehicle Purchase and Use Tax on pleasure vehicles purchased in other states with no credit for sales taxes paid to such other states violates the Commerce Clause of the federal Constitution and constitutes an "overpayment" within the meaning of 32 V.S.A. § 8914.

27. Under the federal Constitution and 32 V.S.A. § 8914, Defendant is required to refund all overpayments of the Motor Vehicle Purchase and Use Tax to Plaintiffs who have paid the tax, together with interest at the legal rate.

RELIEF

WHEREFORE, Plaintiffs pray that judgment of mandamus be entered ordering the Defendant to refund, with interest, under 32 V.S.A. § 8914, all purchase and use taxes paid by Plaintiffs to the Vermont Motor Vehicle Department to the extent such Plaintiffs were denied to a pro-rata credit for sales taxes

previously paid in other states; and granting Plaintiffs and the class members such other relief as the Court may deem just, proper, and equitable, including costs and reasonable attorneys' fees.

Dated: Burlington, Vermont
January 31, 1994

/s/

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Attorneys for Plaintiffs
Thor Christensen and
Joseph Woodrow Pankey, Jr.

<<CHRISCOM.Z01>>

STATE OF VERMONT
Chittenden County, ss.:

SUPERIOR COURT
Docket No. S 117-94 CnC

THOR CHRISTENSEN, et al.]
]
v.]
]
MICHAEL D. GRIFFES]

ENTRY

The motion to certify this action as a class action, pursuant to Rule 23, V.R.C.P., is granted. We are persuaded that the named plaintiffs can adequately represent the interests of the class, and also that it would be impractical to pursue such litigation on a piecemeal basis. The mere fact that the amounts of particular refunds may differ, or that a statute of limitations might affect different members differently, are not grounds to thwart the efficiencies of class determination.

Counsel to submit a proposed order of certification and method of notification of putative class members.

Dated at Burlington, Vermont, August 19 1994.

/s/ Matthew I. Katz

STATE OF VERMONT CHITTENDEN SUPERIOR COURT

CHITTENDEN COUNTY, SS. DOCKET NO. S0117-94 CnC

THOR CHRISTENSEN and)
JOSEPH WOODROW PANKEY, JR.)
)
v.)
)
MICHAEL D. GRIFFES,)
Commissioner of Motor Vehicles)

ORDER ON CLASS CERTIFICATION AND NOTICE

Based on Plaintiff's Motion to Certify Class Action dated April 26, 1994, and the memoranda of the parties, it is hereby ORDERED that this case is certified as a class action under Rule 23(b)(1), V.R.Civ.P., for the purpose of determining whether Defendant is required to pay interest in connection with tax refunds for taxes collected unconstitutionally under 32 V.S.A. §§8901 et seq. The class shall consist of all individuals or other taxpayers who have applied or shall apply for motor vehicle purchase and use tax refunds on or before December 31, 1995. Notice of class certification shall not be required at this time. However, notice shall be given in connection with any compromise or judgment.

Dated: September 2, 1994
Burlington, Vermont

/s/
Hon. Matthew I. Katz
Superior Court Judge

STATE OF VERMONT CHITTENDEN SUPERIOR COURT
CHITTENDEN COUNTY, SS. DOCKET NO. S0117-94 CnC
S1247-93 CnC

PETITIONS OF NORMAN WILLIAMS and SUSAN LEVINE]
]
]
]

THOR CHRISTENSEN and JOSEPH WOODROW PANKEY, JR.]
]
]
v.]
]
PATRICIA A. MCDONALD]

OPINION AND ORDER

The issue presented to this court is whether plaintiffs are entitled to recover interest on motor vehicle purchase and use tax refunds. Plaintiffs argue that Department of Motor Vehicles' refusal to pay interest violates Vermont law and the federal constitution. Defendant maintains that plaintiffs claims are fail as a matter of state and federal law and move for summary judgment and judgment on the pleadings.

The history of this case is long and complicated. Petitioners Norman Williams and Susan Levine paid the four percent motor vehicle purchase and use tax in 1982. After being denied an administrative tax refund, an action was filed in Washington Superior Court. That case made its way to the U.S. Supreme Court where the State's failure to grant a tax credit to nonresidents was ruled violative of the Equal Protection Clause.

Williams v. Vermont, 472 U.S. 14, 22 (1985). The case was remanded.

In 1988, Washington Superior Court dismissed Williams v. Vermont on remand. The dismissal was based on the doctrine of sovereign immunity, barring petitioners from obtaining a refund. Petitioners appealed.

After the U.S. Supreme Court's decision in Williams, Petitioners Christensen and Pankey, Jr. filed a class-action lawsuit in Chittenden Superior Court seeking tax refunds and injunctive relief. Bloom v. Conway, No. 591-86 CnC (Oct. 24, 1990). In 1990, this action was also dismissed on grounds of sovereign immunity. Plaintiffs filed an appeal.

In 1991, the Vermont Supreme Court held that the Washington Superior Court was incorrect. Williams v. Vermont, 156 Vt. 42 (1991). It ruled that Superior Court lacked subject matter jurisdiction over the action. Williams and Levine were required to seek funds from the Commissioner of Motor Vehicles through an administrative process. In 1993, Bloom v. Conway was dismissed for lack of subject matter jurisdiction and petitioners Christensen and Pankey also filed for administrative refunds.

The Motor Vehicle Department formally denied refunds to petitioners Williams and Levine, announcing that the Department would only provide refunds to individuals that paid the tax after the date of the Barringer decision, which held that the tax was unconstitutional under the Commerce Clause. Barringer v. Griffes, 1 F.3d 1331 (2d Cir. 1993). Petitioners Williams and Levine appealed to superior court on September 9, 1993. On June 10, 1994, Williams was certified as a class-action.

No action was taken on the administrative claim filed by Christensen and Pankey. On January 31, 1994, Petitioners Christensen and Pankey filed an action for mandamus, to require that the Commissioner pay the refund with interest. On June 20, 1994, the Legislature enacted Act No. 223, ordering the DMV to refund "without interest" this unconstitutional tax. The refunds were provided without interest on August 2, 1994.

In September 1994, this Court certified a class action in Christensen. On January 20, 1995, the State moved for judgment on the pleadings in Christensen and to dismiss or for summary judgment in Williams. Petitioners oppose these motions and argue they should be granted judgment as a matter of law that they are entitled to interest on their tax refunds.

Relying on Pendell v. Department of Revenue, 847 P.2d 846-850 (Or. 1993), defendant argues that nonpayment of interest on refunds is reasonable and does not violate petitioners' due process rights. Defendant also asserts that refunds are to be paid without interest as mandated by the General Assembly. See Public Acts, 1994 Session, No. 223, Sec. 3.

Petitioners argue that interest is required under V.R.C.P. 54(a), providing litigants entitled to recover a sum certain also be awarded interest on that sum certain. Additionally, petitioners argue that an Act of the General Assembly can not limit or enlarge the rights available at the time the action is filed.

The issue is whether petitioners are entitled to an award of interest. Petitioners bring this action for refund with interest under 32 V.S.A. § 8914, providing "[a]ny overpayment of such tax by the commissioner shall be refunded." This statute provides a "remedy to recover amounts paid to the state under a statute later declared invalid." Williams v. State, 156 Vt. 42, 55 (1991). Defendant argues that without an express provision granting the payment of interest petitioners are not entitled interest. Petitioners assert that the absence statutory language should be construed as allowing payment of interest on motor vehicle use tax refunds.

To resolve this debate, we focus on the rules of statutory construction. The primary goal in interpreting a statute is to give effect to the legislative intent, and it is presumed that the legislature intended the plain meaning of the statutory language. Bisson v. Ward, 160 Vt. 343, 348 (1993). "To discover the legislative purpose, the history of enactment and the trend of recent legislation on the subject afford competent direction . . . ." Swanton Village v. Town of Highgate, 131 Vt. 318, 321 (1973).

Working within these guidelines, the plain meaning of the statute provides only for a refund of overpayment. The absence of a provision for payment of interest persuades this court that the legislature did not intend any additional remedies.[1] Furthermore, the trend of recent legislation does provide direction. On June 20, 1994, the legislature passed Act No. 233 which directed the Commissioner to refund the motor vehicle tax without interest. Strictly using this Act to provide direction and insight, and not to enlarge or limit the rights available under a pending action[2] the legislative intent seems clear. Petitioners are entitled to a refund of overpayment, but not interest.

Both sides submitted volumes of case law from other jurisdictions supporting their positions. Those states which allow interest to be paid, in the absence of statutory authority, rely on the presumption that sans interest there is no adequate remedy.[3] However, there are an equal number of cases where, absent statutory authority, the state or federal government is not obligated to pay interest.[4] The Supreme Court of Vermont has

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[1] When the legislature has intended a payment of interest, it has specifically provided for that by statute. For example, 32 V.S.A. § 5884 provides for interest on refunds for excess income tax and 32 V.S.A. § 7488 states that estate tax overpayments must be refunded with interest.

[2] By statute, an Act of the general assembly "shall not affect a suit begun or pending at the time of [its] passage." 1 V.S.A. § 213.

[3] See Proctor & Gamble Distributing Co. v. Sherman, 2 F.2d 165 (S.D.N.Y. 1924); In re O'Berry, 179 N.Y. 285, 72 N.E. 109 (1904); Chicago, S.P.M. & 0. Ry. Co. v. Mundt, 56 S.D. 530, 229 N.W. 394 (1930). These cases state that a taxpayer from whom an illegal or void tax is collected is entitled to interest on that amount.

[4] See Sims v. White, 522 So.2d 239 (Ala. 1988); Ball v. County of Los Angeles, 82 Cal.App. 3d 312, 147 Cal.Rptr. 252 (1978); and Lakefront Realty Corporation v. Lorenz, 167 N.E.2d 236 (Ill. 1960). These cases hold that the right to recover interest on tax refunds is purely statutory.

not ruled on this issue per se; however, it has outlined methods for constructing and interpreting statutes. Based on these guidelines, the plain meaning of the statute along with the recent directive of the legislature leads this court to conclude that interest is not available under 32 V.S.A. § 8914.

Additionally, petitioners argue that they are entitled to interest under V.R.C.P. 54(a). This rule provides that "[i]n an action where monetary relief is awarded the amount of the judgment shall include . . ., all *interest* accrued on that amount up to and including the date of entry of judgment, ..." V.R.C.P. 54(a). However, matters of interest are left within the broad discretion of the trial judge. Legault v. Legault, 142 Vt. 525, 532 (1983) (holding the trial court's refusal to award interest was correct absent evidence of abuse of discretion). Petitioners received their refund after the enactment of Act No. 233. Even if we consider this refund a "judgment", bringing it within the realm of V.R.C.P. 54(a), an award of interest is not warranted. The statute relied on by petitioners does not provide for interest; an award is not appropriate in this instance.

Accordingly, defendant's motions for summary judgment and on the pleadings are granted.

Dated at Burlington, Vermont on this 5th day of May, 1995.

/s/
Linda Levitt
Presiding Judge

STATE OF VERMONT
CHITTENDEN SUPERIOR COURT

DOCKET NUMBER: S 0117-94 CnC

Christensen, Thor, et al VS Griffes, Michael D.

ENTRY REGARDING MOTION

TITLE OF MOTION: TAXPAYERS' MOTION FOR RECONSIDERATION OF OPINION AND ORDER DATED MAY 5, 1995

DATE MOTION FILED: 5/19/95

RESPONSE FILED:

William Griffin, Esq. 5/25/95 DEF'S MEMORANDUM IN OPPOSITION

Thomas R. Viall, Esq. NONE

_____ GRANTED COMPLIANCE BY_____

__X__ DENIED

_____ SCHEDULED FOR HEARING ON: _____AT_____;
TIME ALLOTTED _____
_____ OTHER

/s/
JUDGE LINDA LEVITT DATE

COPIES SENT TO:

Norman C. Williams, Esq.
William Griffin Esq.
Thomas R. Viall, Esq.

ENTRY ORDER

SUPREME COURT DOCKET NO. 90-539

APRIL TERM, 1993

Colleen Bloom, Thor Christensen, Julie Jameson, Edward Ross and Joseph Woodrow Pankey, Jr.	}	APPEALED FROM:
v.	}	Chittenden Superior Court
Michael D. Griffes, Commissioner, Motor Vehicles	}	DOCKET NO. 591-86CnC

In the above entitled cause the Clerk will enter:

Appeal dismissed for lack of subject matter jurisdiction in superior court pursuant to the stipulation of the parties filed April 2, 1993.

BY THE COURT:

/s/
Frederic W. Allen, Chief Justice

/s/
Ernest W. Gibson III, Associate Justice

/s/
John A. Dooley, Associate Justice

/s/
James L. Morse, Associate Justice

/s/
Denise R. Johnson, Associate Justice

Sec. 3. EFFECTIVE DATE; REFUNDS

This act shall take effect on passage and apply retroactively to affect motor vehicle purchase and use tax paid on motor vehicles registered in this state after August 31, 1980. Notwithstanding the provisions of 12 V.S.A. § 517, any tax collected under 32 V.S.A. Chapter 219 after August 31, 1980 which would not have been collected under that chapter as amended by this act shall be refunded by the commissioner of motor vehicles, without interest, if application for the refund was or is made in writing to the commissioner with proof to the satisfaction of the commissioner that the applicant paid state sales or use tax on a motor vehicle to another state before registering that motor vehicle in Vermont. The commissioner may consider any relevant evidence to establish the tax paid to another state. Applications for a refund shall not be accepted after December 31, 1995. A refund shall be made payable to the taxpayer from whom the tax was collected, or to the lawful heirs, successors or assigns of the taxpayer.

A qualified applicant who cannot document the actual tax paid to another state shall be entitled to a refund equal to the lesser of the tax paid to Vermont or an amount computed by applying the tax rate that was in effect in the state of first taxation to the value of the motor vehicle. For purposes of calculating such a refund, both the tax rate in the state of first taxation and the value of the motor vehicle shall be determined as of the date tax was paid to Vermont.

To qualify for such a refund, an applicant must certify under the pains and penalties of perjury that the applicant, prior to registering a motor vehicle in Vermont, paid a purchase and use tax on that motor vehicle to another state. The applicant must also provide evidence that the applicant:

(a) registered the motor vehicle in a state that requires payment of such tax upon registration; or

(b) titled the motor vehicle in a state that requires payment of such tax upon titling of a motor vehicle.

The commissioner will research the tax rates in effect in other states at all times relevant to determining an applicant's eligibility for a refund. The commissioner will provide relevant information in the possession of the department of motor vehicles for the purpose of calculating refunds. This information shall include: actual purchase and use tax payment to the State of Vermont, the date of such payment, the value of the vehicle at the time of such payment, and the purchase and use tax rate in the state of previous ownership on the date of payment in Vermont. The commissioner shall further more fill in this information and compute the refund due when in receipt of a certified application on a form provided by the commissioner.

Acceptance of a refund will constitute final action on an application for any single vehicle.

The commissioner shall process all applications for refund in a timely manner and shall make available forms on which a refund may be requested.

Sec. 4. APPEALS

Any person aggrieved by a decision of the commissioner to grant or refuse to grant a refund under Sec. 3 of this act may appeal the decision in accordance with 23 V.S.A. § 105. Notwithstanding 23 V.S.A. § 105(b), a person aggrieved by a decision of a hearing under 23 V.S.A. § 105(a), may appeal that decision to small claims court. Such appeal shall be on the record.

Sec. 5. APPROPRIATION

(a) There is appropriated from the transportation fund in fiscal year 1995 to the department of motor vehicles the amount of $500,000.00, of which $400,00.00 shall be expended for personal services and $100,000.00 shall be expended for operating expenses related to processing and providing refunds under this act.

(b) The sum of $27,000.00 from the general fund in fiscal year 1995 is appropriated to the judiciary for the purpose of implementing this act.

/s/
GOVERNOR Date

/S
PRESIDENT OF THE SENATE

/S/
Robert H. Gibson
Secretary of the Senate

/S/
SPEAKER OF THE HOUSE OF REPRESENTATIVES

Burlington Free Press
Burlington, Vermont
Tuesday, June 19, 1984

Court Upholds Vehicle Use Tax

The Associated Press

Montpelier - Vermont's motor vehicle use tax has been upheld by the state Supreme Court.

The Tax was challenged by Leonard Leverson, who moved to Vermont from Wisconsin in 1982 and was required to pay a tax of $112 to register his car.

Leverson claimed the fee was unconstitutional because he had paid a sales tax to the state of Wisconsin when he bought the car.

Vermont imposes a tax of 4 percent, or $600, whichever is smaller, on the purchaser and use of motor vehicles in the state. A person who moves to Vermont from another state is required to pay the tax when he registers his car in Vermont.

Leverson challenged the system, saying it violated the 14th Amendment because it did not give new residents credit for the sales tax they paid in their former state.

The Vermont Supreme Court ruled, however, that a person's right to register his car does not amount to a constitutional privilege.

Assistant Attorney General Andrew Eschen, assigned to the Vermont Transportation Agency, said roughly $1 million a year in revenue was at stake in the case.

Burlington Free Press
Burlington, Vermont
Sunday, January 28, 1996

Filing For Refunds At Buzzer

2,000 file state's car-tax applications

By Betsy Liley, Free Press Staff Writer

More than 2,000 procrastinators overwhelmed the state Motor Vehicle Department in December with a last-minute rush to apply for refunds of an unconstitutional vehicle tax.

About 500 of the last-minute applications were submitted by a Burlington business called Taxback, which was criticized last year for charging people 35 percent of their refund to fill out the simple, one-page refund applications.

Interest in the refunds continues, said Bonnie Rutledge, operations director in the Motor Vehicles Department.

"I still get calls from people who want the form. I tell them the deadline has passed. They get angry," she said.

Vermont has been refunding a state purchase and use tax since mid-1994 on vehicles that were taxed in another state. A federal appeals court ruled the tax unconstitutional in 1993. The 1994 Legislature agreed to make refunds to everyone who paid the tax after it was created in 1980.

Less than $5 million has been paid out in response to 14,000 refund applications. The state had expected to pay $14 million.

Rutledge said she does not expect the additional 2,000 applications to push the total refunds much more than $5 million. Only 500 of the last-minute filings have been processed.

"Our experience last year was that there were nowhere near the number of applicants that might apply. We did assume

that like April 15 there would be a lot of people that would wait until the end," Administration Secretary William Sorrell said.

He downplayed the effect the new applications might have on the state's troubled budget. "I don't think this presents any revenue difficulty for us. The Transportation Fund is quite healthy," he said.

The remaining 1,500 applications are slated to be processed by the end of February. Rutledge said the time line could be delayed. The work will have to be shared by other department employees.

Although state officials expected some residents would file their Taxback applications at the last minute, Rutledge said she was surprised that the applications were not submitted earlier.

"He waited until the day before they were due before he presented them to the deparment," Rutledge said of Taxback founder Uri Feiner. "He waited and dropped them at the counter."

No. 96-1515

Supreme Court, U.S.
FILED
MAY 8 1997
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

THOR CHRISTENSEN and
JOSEPH WOODROW PANKEY, JR.,

Petitioners,

v.

MICHAEL D. GRIFFES, COMMISSIONER
OF MOTOR VEHICLES,

Respondent.

Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Vermont

BRIEF IN OPPOSITION

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

34 pp

TABLE OF CONTENTS

Page

RESTATEMENT OF THE CASE 1

1. The Motor Vehicle Purchase and Use Tax..... 2

2. Prior Litigation 3

3. Public Act No. 223..... 5

4. The Petitioners' Claims..... 6

REASONS FOR DENYING CERTIORARI..... 8

I. THE DECISION OF THE VERMONT SUPREME COURT IS CONSISTENT WITH THE DECISIONS OF OTHER STATE COURTS AND WITH FEDERAL PRECEDENTS..... 8

II. NEITHER *MCKESSON* NOR *WEBB'S FABULOUS PHARMACIES* SUGGEST THAT THERE WAS ANY ERROR IN THE VERMONT SUPREME COURT DECISION..... 10

III. VERMONT HAS ACTED PROMPTLY TO COMPLY WITH THE LAW AS IT HAS EVOLVED DURING THE COURSE OF THIS LITIGATION..... 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984)..... 12

Barringer v. Griffes, 801 F. Supp. 1282 (Vt. 1992)..... 13

Barringer v. Griffes (Barringer II), 1 F.3d 1331 (2d Cir. 1993), cert. denied, 114 S. Ct. 879 (1994).. *passim*

Chicago Freight Car Leasing Co. v. Limbach, 584 N.E.2d 690 (Ohio 1992)..... 9

County of Ada v. Red Steer Drive-Ins, 609 P.2d 161 (Idaho 1980)..... 9

Educational Films Corp. v. Ward, 282 U.S. 379 (1931).... 11

Gulf, M. & O. R. Co. v. Webster County, 194 Miss. 660, 13 So.2d 644 (1943)..... 11

Hopkins v. Southern California Tel., 275 U.S. 393 (1928)..... 11

In re Petition of Williams, 686 A.2d 964, ___ Vt. ___ (1996)..... 9

Lakefront Realty Corp. v. Lorenz, 19 Ill. 2d 415, 167 N.E. 2d 236 (1960)..... 11

Leverson v. Conway, 144 Vt. 523, 481 A.2d 1029 (1984), vacated and remanded, 472 U.S. 1014 (1985)..... 3

Mathews v. Eldridge, 424 U.S. 319 (1976)..... 13

Matthew v. Rodgers, 284 U.S. 521 (1932)..... 11

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990).....8, 9, 10, 11, 13

Pendell v. Dept. of Revenue, 847 P.2d 846 (Or. 1993)..... 9

Quill Corp. v. North Dakota, 504 U.S. 298 (1992)..... 13

TABLE OF AUTHORITIES – Continued

Page

Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981) 11, 12

Stratton v. St. Louis Southwestern R. Co., 284 U.S. 530 (1932) 11

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 11

Williams v. State (Williams II), 156 Vt. 42 (1990), 589 A.2d 840, cert. denied, 502 U.S. 821 (1991) .. 3, 6, 13, 14

Williams v. Vermont, 144 Vt. 649, 478 A.2d 993 (1984) 3

Williams v. Vermont (Williams I), 472 U.S. 14 (1985) 3, 4, 10, 13, 15

STATUTES

12 V.S.A. §517 6

32 V.S.A. §§8903(a) and (b) 2

32 V.S.A. §8905(a) and (b) 2

32 V.S.A. §8911(9)(1991) 3

32 V.S.A. §8911(9)(Supp. 1996) 2

32 V.S.A. §8912 2

OTHER AUTHORITIES

P.A. No. 223 (1994 Vt., Adj. Sess.) 1, 5, 9

P.A. No. 251 (1983 Vt., Adj. Sess.) 14

M.L. Cross, Annotation, *Right to Interest on Tax Refund or Credit in Absence of Specific Controlling Statute*, 88 A.L.R. 2d 825 (1963 & Supp. 1996) 9

BRIEF IN OPPOSITION

RESTATEMENT OF THE CASE

In June, 1994, just five months after this Court denied certiorari in *Barringer II*,[1] the Vermont General Assembly amended the tax laws and effectively repealed the motor vehicle purchase and use tax on vehicles acquired and taxed in other states. Opp. App. 1-2. The owners of these vehicles may now obtain Vermont registrations and drive on Vermont's roads without paying the five percent tax paid by other motorists.

As part of the same legislation the General Assembly enacted a massive tax refund program. The motor vehicles commissioner was authorized to grant tax refunds to everyone who had paid the Vermont purchase and use tax between 1980 and 1994 after first paying a similar tax to another state. P.A. No. 223, §3 (1994 Vt., Adj. Sess.) Pet. App. 29a-31a.

The legislation went on to require the commissioner to assist taxpayers with the refund process, to consider "any relevant evidence" of taxes paid to other states and to honor all refund claims made through December 31, 1995. He was instructed to disregard the one-year statute of limitations that applied to taxpayer lawsuits for refunds. And, consistent with the existing refund statute, he was instructed to pay refunds without also calculating and paying interest. *Id.*

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[1] *Barringer v. Griffes (Barringer II)*, 1 F.3d 1331 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 879 (1994).

This remedy – the refund of all taxes collected over a span of fourteen years, subject only to minimal documentation and without interest – was generous, practical and efficient. It was "a clear and certain remedy" which provided "meaningful backward-looking relief" to a very large universe of taxpayers, including the petitioners. It complied with *Barringer II* and afforded taxpayers all of their rights under the Due Process and Just Compensation Clauses of the Constitution.

1. The Motor Vehicle Purchase and Use Tax.

Vermont imposes a five percent tax on vehicles that are registered for use on the State's roads. *See* Vt. Stat. Ann. tit. 32, §§8903(a) and (b) and 8905(a) and (b). The tax is assessed as a sales tax in the case of vehicles purchased in Vermont and as a use tax in the case of vehicles purchased elsewhere. *Id.* The purpose of the tax is to "improve and maintain the state and interstate highway systems." *Id.*, §8912.

The statutes now provide a tax exemption (in the form of a credit) for vehicles purchased in other states if the owner has paid a purchase or use tax to the other state. *See* Vt. Stat. Ann. tit. 32, §8911(9) (Supp.1996). Persons who have paid an equal or greater tax elsewhere may register their vehicles in Vermont and use Vermont's roads without paying any use tax to Vermont.

Prior to amendment in 1994 this credit for out-of-state taxes was quite limited. It applied only if the vehicle being registered in Vermont had never been registered in the other state, and only if the other state allowed a

reciprocal credit "for Vermont tax[es] paid in similar circumstances." Vt. Stat. Ann. tit. 32, §8911(9) (1991). As a general practice prior to 1986, and as a matter of regulation thereafter until 1994, the tax credit was rarely available and the use tax imposed identical burdens on longtime residents and new residents alike. *See Williams v. State (Williams II)*, 156 Vt. 42, 46 n.3 (1990), 589 A.2d 840, 843, n.3, *cert. denied*, 502 U.S. 821 (1991).

2. Prior Litigation

Petitioners and others have pursued various remedies using a variety of legal theories to avoid paying the purchase and use tax and to obtain tax refunds. They were ultimately successful. In the process, however, the courts consistently acknowledged the fundamental fairness of a tax formula that spread the tax burden to all persons – petitioners included – who registered cars in Vermont and used Vermont's roads.

In 1984, for example, the Vermont Supreme Court concluded that the tax was valid because it served the policy that "those who use the state's highways must contribute toward their maintenance" and because it did not discriminate against interstate commerce. *See Leverson v. Conway*, 144 Vt. 523, 532-36, 481 A.2d 1029, 1034-1036 (1984); *see also Williams v. Vermont*, 144 Vt. 649, 478 A.2d 993 (1984) (same). On appeal this Court reversed, on Equal Protection grounds, but remanded with the observation that if a full record were developed it might "turn out that in practice the statute does not operate in a discriminatory fashion." *Williams v. Vermont (Williams I)*, 472 U.S. 14, 28 (1985). The Court "put to one side the

question whether a State must in all circumstances credit sales or use taxes paid to another State against its own use tax." *Id.*

More recently, the U.S. District Court concluded after a full hearing that Vermont taxed "only the local use of automobiles" and applied "the same formula for calculating the tax . . . whether the car is purchased here or elsewhere." *Barringer v. Griffes*, 801 F. Supp. 1282 at 1286 (Vt. 1992). The Court rejected the argument that the tax discriminated against interstate commerce or otherwise violated the Commerce Clause.

On appeal, in a dissenting opinion, Circuit Judge Van Graafeiland reached the same conclusion as the District Court. He observed that "[i]n order for Vermont to make fair charges for the use of its highways it had to adopt some means of measuring use that was practical in operation and possessed at least a modicum of accuracy." *Barringer II, supra*, 1 F.3d at 1340 (1994). He reasoned that a tax like Vermont's, based on a car's value, should withstand constitutional scrutiny because it "bears at least a rough relationship to the benefits the car's owner will receive." *Id.* (citing *Williams I, supra*, 472 U.S. at 25 n.9) ("[d]espite the looseness of the fit, we would be hard pressed to say that this means of funding highway maintenance and construction is irrational.").

The two-judge majority on the Court of Appeals disagreed, ruling that the tax was unconstitutional as applied to persons who have paid taxes to other states. However, the majority refused to hold that a tax credit was "affirmatively required" in these cases, saying that such a holding would give the case "a broader reach than

necessary to decide this appeal." *Id.* at 1337. They decided instead that "[w]hat is to be done now is a matter confided to the Vermont legislature." *Id.*

3. Public Act No. 223.

The General Assembly responded to the Court of Appeals ruling by abandoning the principle that all who use Vermont's roads should pay a purchase and use tax to maintain them. The credit for out-of-state taxes was expanded so that the Vermont tax no longer applies to "motor vehicles on which a state sales or use tax has been paid by the person applying for a registration in Vermont . . . " P.A. No. 223, *supra,* at §1 (1994 Vt., Adj. Sess.) Opp. App. 1. Only "[i]f the tax paid in another state is less than the Vermont tax" is the use tax payable in Vermont, in which case "the tax due shall be the difference . . . " *Id.*

Act No. 223 also established a program for paying tax refunds. The motor vehicles commissioner was directed to refund taxes collected from all taxpayers who had paid similar taxes to other states. *Id.*, §3 Pet. App. 29a-30a. If the taxpayer was unable to document the taxes that were paid, the commissioner was required to "research the tax rates in effect in other states at all times relevant", "provide relevant information in the possession of the department of motor vehicles" and "compute the refund due when in receipt of a certified application." *Id.* The sum of $500,000 was appropriated to cover the administrative costs of processing refunds. *Id.*, §5.

In the same Act the General Assembly considered whether the commissioner should calculate and pay some rate of interest on refunds and whether he should assert the statute of limitations that applies to civil actions to recover taxes. It answered both questions in the negative. The Act authorized refunds of taxes collected since 1980 "[notwithstanding] the provisions of 12 V.S.A. §517" (the one-year statute of limitations in tax cases), and it authorized refunds "without interest". *Id.*, §3.

4. The Petitioners' Claims.

The petitioners moved to Vermont in 1984 and 1985 and sometime thereafter registered vehicles that they had brought with them. They had paid sales taxes to Indiana and to Louisiana when they purchased the vehicles in those states, and they paid a use tax when they registered the vehicles in Vermont. Pet. App. 11a-12a. Contrary to the assertions in their petition, they did not pay "a second sales tax" (or any sales tax) to Vermont. They paid a single use tax. *Id.*

Petitioners first sued for tax refunds in 1986, in the Vermont Superior Court. The Superior Court dismissed on the merits, petitioners appealed, and the Vermont Supreme Court dismissed for lack of subject matter jurisdiction. Pet. App. 28a. The appeal was dismissed by stipulation after the parties agreed that motor vehicles tax refund claims should be decided in administrative proceedings before the commissioner, and not in the superior courts. *See Williams II, supra,* 156 Vt. at 56.

Petitioners took no further action until September, 1993, after the Court of Appeals had announced its decision in *Barringer II*. At this point they filed refund claims with the commissioner, citing the Court's decision. The commissioner had already requested a rehearing in the Court of Appeals and so deferred action on their claims.

During the next several months the Court of Appeals denied the Commissioner's request for rehearing in *Barringer II*, the Supreme Court denied certiorari and the petitioners filed a civil action for tax refunds and for interest on the refunds. The commissioner answered the complaint and asserted various defenses including the statute of limitations. However, when the Legislature authorized refunds in all cases without regard to the limitations period the commissioner refunded petitioners' taxes.

Petitioners accepted refunds but continued to press their Superior Court action in an effort to recover interest on the amounts refunded. Their case was consolidated with another action that their attorney had filed *pro se* and on behalf of another client. The parties agreed that all of these cases could be decided on motions and cross-motions for summary judgment. Opp. App. 3 (Norman C. Williams letter to superior court). The trial court denied petitioners' claims for interest and entered judgment in favor of the defendant. The Vermont Supreme Court affirmed.

REASONS FOR DENYING CERTIORARI

Certiorari should be denied because the lower courts and this Court have consistently held that the States retain flexibility to fashion case-specific remedies when a tax is found to be unconstitutional. Petitioners have cited no decision which holds that discriminatory taxes must be refunded with interest in order to satisfy Due Process. Nor have they cited any decision which holds that tax payments to the government are takings covered by the Just Compensation Clause.

The remedial legislation enacted by the Vermont General Assembly in the wake of *Barringer II* authorized the refund of motor vehicle taxes paid over a span of fourteen years. It even included an appropriation of funds earmarked to provide assistance to taxpayers unable to complete their own refund applications. This law gave petitioners and others like them a full refund of the taxes they had paid. It afforded them a "clear and certain remedy" and the "meaningful backward-looking relief" required by the Constitution. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18, 31 (1990).

I. THE DECISION OF THE VERMONT SUPREME COURT IS CONSISTENT WITH THE DECISIONS OF OTHER STATE COURTS AND WITH FEDERAL PRECEDENTS.

The Supreme courts of three states (including Vermont) have considered the precise question presented by this case: whether Due Process requires the payment of interest on tax refunds when a state chooses refunds as

the form of relief it will provide to cure an unconstitutional discrimination. All three courts decided that interest payments are not required in these circumstances. *See Pendell v. Dept. of Revenue,* 847 P.2d 846 (Or. 1993) (power to tax distinguished from power of eminent domain); *Chicago Freight Car Leasing Co. v. Limbach,* 584 N.E.2d 690 (Ohio 1992) (failure to pay interest not a denial of due process); and *In re Petition of Williams,* 686 A.2d 964, ___ Vt. ___ (1996). The courts are not divided on this issue.

The several state court decisions cited by petitioners are distinguishable from the present case for two reasons. First, all of those cases were decided in the absence of a statute which indicated whether or not interest should be paid. *See* M.L. Cross, Annotation, *Right to Interest on Tax Refund or Credit in Absence of Specific Controlling Statute,* 88 A.L.R. 2d 825 (1963 & Supp. 1996). The Vermont Supreme Court was guided by Public Act No. 223 – a specific controlling statute.

The cases are also distinguishable because they did not arise in a context where the state was "free to choose which form of relief it will provide." *McKesson, supra,* 496 U.S. at 51. The taxing authority was not free to resolve claims, for example, by retroactively increasing the assessments on other taxpayers. *See,* e.g., *County of Ada v. Red Steer Drive-Ins,* 609 P.2d 161 (Idaho 1980). As a matter of state law or policy the choice of remedies was limited to tax refunds.

The present circumstances are different. According to *McKesson,* "a State found to have imposed an impermissible discriminatory tax retains flexibility in responding to this determination." *Id.* at 39-40. The choice of remedies

ranges "from a refund of the excess taxes . . . to an offsetting charge to previously favored [taxpayers]." *Id.* at 51. Moreover, "within our due process jurisprudence, state interests traditionally have played, and may play, some role in shaping the contours of the relief that the State must provide . . . " *Id.* at 50.

This balancing of state interests and taxpayer interests and this deference to a state's choice of remedies was evident throughout the course of the litigation over Vermont's purchase and use tax. In *Williams I* this Court "express[ed] no opinion as to the appropriate remedy." 472 U.S. at 28. In *Barringer II* the Court of Appeals decided that "[W]hat is to be done now is a matter confided to the Vermont legislature." 1 F.3d at 1337.

The Vermont legislature selected an appropriate remedy and its choice was sustained by the Vermont Supreme Court. There is no inconsistency between the decision of the Vermont Supreme Court and the rulings of other courts that have addressed the issue in similar circumstances.

II. NEITHER *MCKESSON* NOR *WEBB'S FABULOUS PHARMACIES* SUGGEST THAT THERE WAS ANY ERROR IN THE VERMONT SUPREME COURT DECISION.

McKesson did not hold that discriminatory taxes must be refunded with interest. Indeed, the range of options endorsed by *McKesson* included "refunds on a reasonable installment basis" without any reference to paying interest. *Id.* at 45. The tax refunds authorized by the Vermont legislature and approved by the Vermont Supreme Court

– full refunds of all taxes actually paid by the petitioners – provided the "clear and certain" remedy required by *McKesson*.

Petitioner's reliance on *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), is also misplaced. *Webb's* was not a tax case. It was a dispute about interest that had accrued on an interpleader fund that was held in escrow by a state court. The Supreme Court decided that since the fund was "private property" held for the purpose of making a distribution among private creditors, the Takings Clause protected both principal and interest. *Id.* at 160-161. The Court's holding was grounded in the "narrow circumstances of this case." *Id.* at 164.

Nor is any error suggested by the earlier cases cited by petitioners. *See* Petition at 11, citing *Educational Films Corp. v. Ward*, 282 U.S. 379 (1931) and *Hopkins v. Southern California Tel.*, 275 U.S. 393 (1928). These decisions were discredited by the Court's opinion in *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981).

> [Their] treatment of a no-interest refund remedy was undercut by later cases. Without expressly addressing the issue, the Court in two cases decided the same day, *Matthew v. Rodgers*, 284 U.S. 521, 528 (1932) (Mississippi refund remedy); *Stratton v. St. Louis Southwestern R. Co.*, 284 U.S. 530, 534 (1932) (Illinois refund remedy), found adequate two state refund remedies that apparently did not pay interest, *Gulf, M. & O. R. Co. v. Webster County*, 194 Miss. 660, 662, 13 So.2d 644, 645 (1943); *Lakefront Realty Corp. v. Lorenz*, 19 Ill. 2d 415, 422-423, 167 N.E. 2d 236,

240-241 (1960). Therefore, prior federal equity practice is a two-sided sword.

450 U.S. at 524 n. 31.

III. VERMONT HAS ACTED PROMPTLY TO COMPLY WITH THE LAW AS IT HAS EVOLVED DURING THE COURSE OF THIS LITIGATION.

Petitioners have attempted to portray Vermont and its officials as scofflaws. They argue that certiorari should be granted to teach "States and State officials to respect constitutional requirements." Petition at 23. The flaw in the argument is that the constitutional principle announced in *Barringer II* was previously unknown. Less than a year prior to that Court of Appeals decision the Chief Judge of the United States District Court for the District of Vermont had decided that there was no constitutional violation.

Moreover, Vermont's response to *Barringer II* was not at all analogous to the Florida circumstances discussed in *McKesson* and invoked by petitioners. The Florida statute at issue in *McKesson* "reflected only cosmetic changes from the prior version of the tax scheme that itself was virtually identical to the Hawaii scheme invalidated in *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984)." *McKesson,* 496 U.S. at 46. The Vermont statute at issue here effectively repealed the tax on vehicles like those owned by petitioners and gave them tax refunds.

The legal backdrop prior to *Barringer II* afforded little guidance to Vermont policymakers attempting to fashion a tax that was both easy to administer and that applied to all registered vehicles. As Judge Parker observed, "[i]t is

probably an understatement to say that the Court's dormant Commerce Clause jurisprudence, particularly as it relates to limits on state taxation powers, is unpredictable." *Barringer v. Griffes*, 801 F. Supp. at 1286. This Court has acknowledged that the law in this area "is something of a 'quagmire' ". *Quill Corp. v. North Dakota*, 504 U.S. 298, 315 (1992).

Barringer II itself produced conflicting opinions, and the two-judge majority began its discussion by remarking on the "changing winds" of Commerce Clause doctrine. *Barringer II, supra*, 1 F.3d at 1332. Continuing this nautical allusion they resolved "to hug the shore closely", declined to "rechart our course" to fashion a specific remedy and in the end said that "what is to be done . . . is a matter confided to the Vermont legislature." *Id.* This was hardly an outcome consistent with the Petitioners' characterization of Vermont officials and the litigation generally.

Petitioners are also wrong to imply that Vermont evaded this Court's decision in *Williams I*. Consistent with *Williams* the state promulgated a regulation to assure that the purchase and use tax applied to new and old Vermonters alike. *See Williams II, supra*, 156 Vt. at 46 n.3. Consistent with *Williams I, Mathews v. Eldridge*, 424 U.S. 319 (1976), and *McKesson*, the Vermont Supreme Court decided that the commissioner of motor vehicles had the statutory authority and a constitutional obligation to afford taxpayers a due process hearing to challenge any erroneous or unlawful tax collection. *See*

Williams II, 156 Vt. at 52-56.[2] Petitioners' attorney requested and obtained exactly such a hearing. Opp. App. 4-5 (excerpts from Hearing Officer's Findings of Fact, Conclusions of Law and Order).

In this same vein petitioners claim that the Vermont courts committed procedural errors in the present case by ignoring the rules that govern motions for judgments on the pleadings and motions to dismiss. Petition at 19 n.9 and 22 n.12. In fact the case was submitted to the trial court on cross-motions for summary judgment, a procedure that petitioners agreed to. *See* Opp. App. 3 ("Petitioners have no objection to the Court treating the [Petitioners'] Memorandum in Opposition as a Cross-Motion for Summary Judgment, if it agrees that no material facts are in dispute.") Neither the trial court nor the Vermont Supreme Court relied on facts in dispute.[3]

A final error in the petition is the claim that taxpayers like the petitioners are liable for interest and penalties on late payments up to 25 percent of the tax. Petition at 20 n.10. The 25 percent penalty was enacted as part of a law that taxes car rental companies. It does not apply at all to individuals. *See* P.A. No. 251 (1983 Vt., Adj. Sess.) Opp. App. 6-11 ("An Act Relating to the Motor Vehicle Purchase and Use Tax on Pleasure Car Rentals").

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[2] *Williams II* also overruled the inconsistent part of *American Trucking Ass'ns v. Conway*, 146 Vt. 579, 508 A.2d 408 (1986), a case cited by Petitioners as an example of Vermont intransigence.

[3] The statements contained in the press clippings appended to the Petition were not among the agreed facts. Pet. App. 32a-34a.

And, as petitioners' attorney well knows, the 1 percent penalty on late payments by individuals is not enforced. *See Williams v. Vermont*, 472 U.S. at 36 ("Mr. Williams and Ms. Levine apparently delayed the day on which they were required to pay for their right to use Vermont's roads by failing to register their cars within the time period set by Vermont law."). Neither Mr. Williams or Ms. Levine paid any penalties.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

STATE OF VERMONT

WILLIAM H. SORRELL
Attorney General

WILLIAM GRIFFIN
Chief Assistant Attorney General

THOMAS R. VIALL
Assistant Attorney General

NO. 223. AN ACT RELATING TO MOTOR VEHICLE PURCHASE AND USE TAX CREDIT FOR TAX PAID TO OTHER STATES.

(S.371)

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. 32 V.S.A. § 8911(9) is amended to read:

(9) "[pleasure cars acquired outside the state by a resident of Vermont]" *motor vehicles* on which a state sales or use tax has been paid by the person applying for a registration in Vermont "[, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances]". If the tax paid in another state is less than the Vermont tax the tax due shall be the difference;

Sec. 2. REPEAL

32 V.S.A. § 8911(11) is repealed.

* * *

See Pet's App. for Sections 3, 4 and 5.

GRAVEL AND SHEA
Attorneys at Law
76 St. Paul Street
Post Office Box 369
Burlington, Vermont 05402-0369

February 23, 1995

Ms. Diane A. Lavallee
Clerk
Chittenden Superior Court
P. O. Box 187
Burlington, VT 05402

Re: Williams v. Vermont – Docket No. S1247-93 CnC
Christensen v. McDonald – Docket No. S0117-94 CnC

Dear Diane:

I enclose two copies of Petitioners' Memorandum In Opposition To Summary Judgment in the above cases (one for each case file). Petitioners have no objection to the Court treating the Memorandum In Opposition as a Cross-Motion for Summary Judgment, if it agrees that no material facts are in dispute. *See* V.R.Civ.P. 56(c) ("summary judgment, when appropriate, may be rendered against the moving party"). However, Petitioners would respectfully request a conference with the Court if it does intend to issue a decision on the merits, in order to discuss notice to class members. Such notice was not given initially, while the parties discussed a possible settlement.

Thank you very much for your consideration.

Very truly yours,

GRAVEL AND SHEA

/s/ Norman C. Williams
Norman C. Williams

NCW:wnb

Enclosures

cc: William E. Griffin, Esq. (w/enclosures)
Thomas R. Viall, Esq. (w/enclosures)

STATE OF VERMONT
AGENCY OF TRANSPORTATION
DEPARTMENT OF MOTOR VEHICLES
120 State Street, Montpelier, Vermont 05603-0001

STATE OF VERMONT
DEPARTMENT OF MOTOR VEHICLES

IN RE:	)
	)
PETITIONS OF NORMAN WILLIAMS, SUSAN LEVINE AND JAMES WOODARD	)
	)
	)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Appearances:

Petitioners Norman Williams and Susan Levine were represented by Norman Williams Esquire and Jerome F. O'Neill of O'Neill and Crawford. Petitioner James Woodard was represented by Mary Kehoe, Esquire of Saxer, Anderson, Wolinsky and Sunshine. Thomas R. Viall, Esquire, Assistant Attorney General represented the Respondent State of Vermont Agency of Transportation Department of Motor Vehicles.

Decision Regarding Petition of James Woodard:

No pre-hearing pleadings were filed on behalf of James Woodard, and Mr. Woodard did not appear at the Final Hearing in these proceedings. Therefore, the Petition of James Woodard is dismissed.

Procedural Facts:

These Petitions are filed in accordance with the provisions of Title 23 V.S.A. §105, the undersigned Hearing Officer having been appointed to conduct these proceedings by Michael D. Griffes, Commissioner of the Motor Vehicle Department of the Vermont Agency of Transportation. The Petitioners seek refunds of motor vehicle Purchase and Use Taxes paid in accordance with Title 32 V.S.A. §8903. Title 32 V.S.A. §8914 provides for the refunding of taxes determined by the Commissioner to have been over payments.

* * *

not Vermont residents at the time they purchased motor vehicles out of state and who subsequently moved to Vermont. Nevertheless, Petitioners have failed to prove that either of them were members of this class of persons. Indeed, the record reflects that neither Petitioner consulted a Motor Vehicle Department Inspector at any time. The State has proven that applicants who were dealt with by other units of the Department were not denied equal protection of the laws. Although there is no specific evidence as to the relative numbers of the larger class of persons whose applications were resolved without any contact with the Inspectors and the smaller class of persons who did appeal to the Inspectors, I must conclude that the former class vastly out numbers the latter. Further, I find no case law authority for the proposition that the entire Department should be guilty of the sins of the Inspectors so that the Petitioners should be entitled to relief. Given the fact that each of the Petitioners dealt with units of the Department in which the law was

administered without any violations of equal protection as applied, I find that the Petitioners are not entitled to refunds of their motor vehicle Purchase and Use Taxes.

Having decided the merits of the Petitions favorably to the Department, I will not consider the question of the statute of limitations, noting that our Supreme Court has also remained silent on this question, *Williams v. State* 156 VT 42, 53 footnote 10.

Order:

The Petitions of Norman Williams and Susan Levine are each denied.

DATED at Jeffersonville, Vermont this 20th day of July, 1993.

/s/ Philip J. Fitzpatrick
Philip J. Fitzpatrick, Esquire
Hearing Officer

PUBLIC ACTS, 1984 SESSION

NO. 251. AN ACT RELATING TO THE MOTOR VEHICLE PURCHASE AND USE TAX ON PLEASURE CAR RENTALS.

(H.726)

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. 32 V.S.A. § 8902(9) is added to read:

(9) "Rental of pleasure cars on a short-term basis", or words of similar import, means rentals of pleasure cars for a rental period of less than one year. It shall not apply to school buses.

Sec. 2. 32 V.S.A. § 8903(a) is amended to read:

(a) There is hereby imposed upon the purchase in Vermont of a motor vehicle by a resident a tax at the time of such purchase, payable as hereinafter provided. The amount of the tax shall be four percent of the taxable cost of the motor vehicle or $600.00 for each motor vehicle, whichever is smaller, except that pleasure cars which are purchased for use in short-term rentals shall be subject to taxation under subsection (d) of this section.

Sec. 3. 32 V.S.A. § 8903(d) is added to read:

(d) There is hereby imposed a use tax on the rental charge of each transaction, in which the renter takes possession of the vehicle in this state, during the life of a pleasure car purchased for use in short-time rentals, which tax is to be collected by the rental company from the renter and remitted to the commissioner. The amount of the tax shall be five percent of the rental charge. Rental

charge means the total rental charge for the use of the pleasure car, but does not include a separately stated charge for insurance, or recovery of refueling costs, or other separately stated charges which are not for the use of the pleasure car. In the event of resale of the vehicle in this state for use other than short-term rental, such transaction shall be subject to the tax imposed by section 8903(a).

Sec. 4. 32 V.S.A. § 8905(d) is added to read:

(d) Every person required to collect the use tax under section 8903(d) shall forward such tax and a report of same on forms prescribed and furnished by the commissioner at the frequency determined by the commissioner.

Sec. 5. 32 V.S.A. § 8906 is amended to read:

§ 8906. TAX FORM CONTENTS

Except as otherwise provided pursuant to section 8905(d), such tax form shall require information as to the purchase price of the motor vehicle, the value of any motor vehicle accepted in trade together with its make, type, serial or identification number and year of manufacture and the make, type, serial or identification number and year of manufacture of the motor vehicle purchased.

Sec. 6. 32 V.S.A. § 8909 is amended to read:

§ 8909. ENFORCEMENT

If the tax due under subsections (a), (b) and (d) of section 8903 of this title is not paid as hereinbefore provided the commissioner shall suspend such purchaser's

or rental company's right to operate a motor vehicle within the state of Vermont until such tax is paid, and such tax may be recovered with costs in an action brought in the name of the state on this statute.

Sec. 7. 32 V.S.A. § 8913 is amended to read:

§ 8913. FRAUDULENT COLLECTION OF TAX

No person except the commissioner and his authorized representatives, including rental companies as provided in section 8903(d), may collect or accept payment of any tax imposed by this chapter. Any person so doing shall be presumed to have the intent to convert it to his own use. Any unauthorized person who wilfully collects or accepts payment of such a tax, upon conviction for a first offense, shall be fined not more than $200.00 or imprisoned for not more than ninety days, or both. Upon each subsequent conviction he shall be fined not more than $500.00 or imprisoned for not more than one year, or both.

Sec. 8. 32 V.S.A. § 8903(e) is added to read:

(e) Any person registering a pleasure car in this state subject to the tax imposed by subsection (d) which is not actually rented for not less than 30 days in any single year must pay the tax imposed by subsection (a) or (b) upon demand of the commissioner.

Sec. 9. 32 V.S.A. § 8902(10) is added to read:

(10) "Rental company" means any person offering pleasure cars for rent on a short-term basis.

Sec. 10. 32 V.S.A. § 8916 is added to read:

§ 8916. BONDS

(a) When the commissioner deems it necessary to protect the revenues to be obtained under this chapter, he may require a rental company to file with him a bond issued by a surety company authorized to transact business in this state and approved by the commissioner of banking and insurance of this state as to solvency and responsibility, in an amount fixed by the commissioner, but not to exceed the total potential liability of such person, to secure the payment of any tax or penalties or interest due or which may become due from a rental company under this chapter. In the event that the commissioner determines that such person is to file a bond, he shall give notice to him to that effect, specifying the amount of the bond required. That person shall file a bond within 15 days after the giving of the notice unless within those 15 days he shall request in writing a hearing before the commissioner at which the necessity, propriety and amount of the bond shall be determined by the commissioner. The determination shall be final and shall be complied with within 15 days after the giving of notice thereof. In lieu of a bond, securities approved by the commissioner or cash in such amount as he may prescribe may be deposited, which shall be kept in the custody of the state treasurer who may at any time upon instructions from the commissioner without notice to the depositor apply them to any tax or interest or penalties due, and for that purpose the securities may be sold by him at public or private sale without notice to the depositor thereof.

(b) The total amount of the bond required of a rental company may be fixed by the commissioner and

may be increased or decreased by him at any time subject to the limitations imposed by this section.

(c) If the liability upon a bond filed by a rental company with the commissioner becomes discharged or reduced, whether by judgment rendered, payment made or otherwise, or if in the opinion of the commissioner any surety on a bond has become unsatisfactory or unacceptable, the commissioner shall require the rental company to file a new bond with satisfactory sureties in the same amount and, upon failure to do so, the commissioner shall forthwith suspend the right to operate a motor vehicle in this state.

(d) If a rental company fails or refuses to increase the amount of a bond or file a bond as required by the commissioner within 15 days after notice mailed to him, his right to operate a motor vehicle in this state shall be suspended forthwith.

Sec. 11. 32 V.S.A. § 8917 is added to read:

§ 8917. BONDS; DISCHARGE

Any surety on a bond furnished by a rental company shall be discharged from any liability to the state accruing on the bond after expiration of 60 days from the date the surety shall have filed with the commissioner a written request to be released and discharged, but the surety shall not be released or discharged from liability already accrued or which shall accrue before the expiration of the 60-day period. The commissioner, upon receipt of such a request, shall promptly notify by mail the rental company who furnished the bond. Unless the rental company, prior to the expiration of the 60-day period, files a new bond

satisfactory to the commissioner, the commissioner shall suspend his right to operate a motor vehicle in this state.

Sec. 12. 32 V.S.A. § 8918 is added to read:

§ 8918. RECORDS

(a) Each rental company shall keep and retain for a period of not less than three years such records as may be prescribed by the commissioner which are reasonably necessary to substantiate the reports required by section 8905(d).

(b) The commissioner or his agents may examine the books and records of any rental company during the usual business hours of the day to verify the truth and accuracy of any statement, report or return or to determine if the tax imposed by this chapter has been paid.

Sec. 13. 32 V.S.A. § 8919 is added to read:

§ 8919. ADDITIONAL ASSESSMENTS

(a) If the commissioner is not satisfied that the report filed or the amount of tax paid by a rental company is accurate, after investigating and finding such inaccuracy, he may make an additional assessment of taxes due from such rental company based upon his investigation. A penalty equal to ten percent and interest at the rate of one and one-half percent per month shall be payable on the additional assessment, with interest computed from the date the tax payment was due. The commissioner shall give notice by mail to the rental company of the additional assessment, penalty and interest and shall designate the error or reason for such assessment. Payment shall be due within 30 days of the date of mailing the notice.

(b) When no report or payment of tax has been made as required by section 8905(d), or when a wilfully false or fraudulent report has been filed, the tax may be assessed at any time; in all other cases, no assessment of additional tax, and the mailing of notice thereof, shall be made after the expiration of three years from the date of filing a report.

Sec. 14. 32 V.S.A. § 8920 is added to read:

§ 8920. INTEREST; PENALTIES

(a) Any person who fails to file a report when due shall pay a fee of $10.00 as partial compensation for the added administrative costs.

(b) In addition to the fee prescribed in subsection (a), any person who fails to pay any tax when due, shall pay in addition to the tax interest calculated at one and one-half percent per month on the tax from the due date, until paid. In addition, if the taxpayer fails to pay the tax liability in full within 30 days, a penalty equal to five percent of the outstanding tax liability for each month or portion thereof, shall be paid; provided, however, that in no event shall the amount of the penalty imposed hereunder exceed 25 percent of the tax liability unpaid on the prescribed date of payment. The commissioner may remit all or any part of the penalty if he is satisfied that the delay was excusable.

Sec. 15. 32 V.S.A. § 8921 is added to read:

§ 8921. ASSESSMENTS

If a rental company neglects or refuses to file any report required by this chapter, the commissioner shall make an estimate of the tax due, based upon information available to him, for the period for which the rental company failed to make the report, and shall assess the tax due from such rental company, adding to the amount thus determined a penalty of 50 percent thereof. The assessment shall bear interest at the rate of one and one-half percent per month from the date the tax payment was due until paid. The commissioner shall give the rental company notice by mail of the assessment and payment shall be due within 15 days of the date of the mailing of the notice.

Sec. 16. 32 V.S.A. § 8922 is added to read:

§ 8922. ASSESSMENT; HEARING

A rental company against whom assessment is made pursuant to section 8919 or 8902 may appear in person or by counsel in the office of the commissioner within 15 days after the mailing to him of notice of the assessment then and there to show cause why the assessment is in error or to present any other facts or testimony that would bear on the amount of the assessment or the manner in which it was made. The hearing may be continued from time to time. If the rental company or his agent does not appear within the 15 days, the assessment shall become final.

Sec. 17. 32 V.S.A. § 8923 is added to read:

§ 8923. LICENSE REQUIRED

(a) It is unlawful for any person to act as a rental company without being licensed as such.

(b) On or before January 1 of each year, an applicant for a rental company license shall file with the commissioner an application prepared and furnished by the commissioner. The application shall not be under oath but shall contain a declaration that it is made under the penalties of perjury.

(c) Upon receipt of an application in proper form and the other conditions and requirements of this chapter having been complied with the commissioner may issue a license to an applicant which will remain in effect for one year or until such time as surrendered or revoked.

Sec. 18. TRANSITIONAL PROVISIONS

All rental companies shall apply for their first rental company license during the month of December 1984. Thereafter licenses shall be obtained pursuant to the provisions of section 8923(b).

Sec. 19. EFFECTIVE DATE

This act shall take effect January 1, 1985 except for Sec. 18 which shall take effect December 1, 1984.

Approved: May 16, 1984

Supreme Court, U.S.
FILED
MAY 27 1997
OFFICE OF THE CLERK

(3)

No. 96-1515

In The

Supreme Court of the United States

October Term, 1996

THOR CHRISTENSEN and
JOSEPH WOODROW PANKEY, JR.,
Petitioners,

v.

MICHAEL D. GRIFFES, COMMISSIONER
OF MOTOR VEHICLES,
Respondent.

Petition For A Writ of Certiorari
To The Supreme Court Of The State Of Vermont

REPLY BRIEF FOR THE PETITIONERS

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8 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BY PETITIONERS 1

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES

Acker v. Commissioner, 258 F.2d 568 (6th Cir.), *aff'd*, 361 U.S. 87 (1958) 4

Armstrong v. United States, 364 U.S. 40 (1960) 1

Bonner v. Coughlin 517 F.2d 1311 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978) 2

Evans v. City of Chicago, 522 F.Supp. 789 (N.D. Ill. 1980) 2

Henderson Bridge Co. v. City of Henderson, 173 U.S. 592 (1899) 4

Kohl Industrial Park Co. v. Rockland County, 710 F.2d 895 (2d Cir. 1983) 4

McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990) . . . 1, 2, 3

Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981) 2

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 1, 3

Williams v. State (Williams II), 589 A.2d 840 (Vt. 1990), *cert. denied*, 502 U.S. 821 (1991) 4, 5

STATUTES

Vt. Stat. Ann. tit. 12, § 517 . . . . . 4, 5

Vt. Stat. Ann. tit. 12, § 558(a)(2) 4

REPLY BY PETITIONERS

While Respondent might prefer to retain interest which the State of Vermont has earned on unconstitutional state taxes, his Brief in Opposition suggests why review by this Court is appropriate. Like the Vermont Supreme Court and the Supreme Courts of Ohio and Oregon, Respondent seizes on the "flexible remedy" language in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), to justify keeping substantial amounts of interest on funds which the State of Vermont never should have collected in the first place. Respondent does not deny that, without interest, the tax refund offered by the State falls far short of restoring Petitioners to the position they "should have occupied absent any Commerce Clause violation." *McKesson*, 496 U.S. at 42.[1] Nor does he dispute that, by appropriating the interest, the State has forced the Petitioners "alone to bear public burdens," just because they were unfortunate enough to be subject to an unconstitutional tax. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980) (*quoting Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

Petitioners seek certiorari to resolve differences over what the Due Process and Just Compensation Clauses require

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[1] Even at a modest six percent rate, the interest on Petitioner Christensen's funds amounts to 70 percent of principal and on Petitioner Pankey's funds to almost 60 percent, since both Petitioners paid in the mid-1980's. *See* Petition For A Writ of Certiorari at 17 n.7. Altogether, interest on the unconstitutional taxes amounts to at least $3 million over the 14-year period they were collected. *Id.* at 18 n.8. Such an amount cannot be disregarded as *de minimis* or overlooked as an administrative expense.

in the context of post-deprivation relief.[2] Under *McKesson*, Respondent urges, a State need only provide "meaningful backward looking relief" and "a clear and certain remedy" to satisfy due process requirements. Brief In Opposition at 8.[3] The difficulty with Respondent's argument is that it provides no way of determining what an adequate remedy is. A State might decline to pay any tax refund at all for twenty years, or it might limit a refund to 85 percent of the principal. In either case, a State could declare that its remedy was "clear and certain" and provided "meaningful backward looking relief."

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[2] Respondent suggests that the lower courts are not divided. Brief in Opposition at 9. Petitioners would note, however, that the court in *Evans v. City of Chicago*, 522 F.Supp. 789, 796-800 (N.D. Ill. 1980), held that the city's practice of delaying payment of judgments against it from two to four years did violate the Due Process Clause. In addition, the Seventh Circuit has held that any post-deprivation remedy which ignores loss of use does not satisfy due process. *See Bonner v. Coughlin*, 517 F.2d 1311, 1312-14 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978). Moreover, as a practical matter there is a deep division in the jurisdictions as to whether taxpayers are entitled to interest on tax refunds. *See* Petition at 11-13 & n. 5.

[3] Respondent also cites *dicta* from *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 524 n.31 (1981), to argue that this Court considers a tax refund of principal only to be an adequate remedy. *See* Brief in Opposition at 11, 12. While *Rosewell* did point out cases where interest apparently was not awarded *sub silentio*, it did not suggest that the Court would allow a State to retain interest on unconstitutional taxes if directly confronted with the issue.

The inevitable result of such an *ad hoc* approach will be widely-varying remedies for the same constitutional wrong.[4]

This Court appeared to provide a clear, workable, and common sense limiting principle in *McKesson*, but Respondent and the State Courts have refused to acknowledge it. *McKesson* said that a State's post-deprivation remedy must restore the *status quo ante* by putting taxpayers back in the same position they would have enjoyed but for the State's constitutional violation. Unlike the decision below, such a rule does not reward states who decline to provide pre-deprivation relief, nor does it lessen the incentive for states to respect constitutional requirements in enacting tax legislation.

Respondent also suggests that the Just Compensation principles established in *Webb's* should not apply in this case. He attempts to distinguish *Webb's* on the grounds that it "was not a tax case" but rather involved "'private property' held for the purpose of making a distribution among private creditors." Brief in Opposition at 11. Yet Respondent does not explain why the State of Vermont should be entitled to use the proceeds from an illegal tax without compensation, while Florida is forbidden from doing so with money in an interpleader fund which is perfectly valid and legal. One might have supposed that Florida would have the better claim, since in *Webb's* payment was made by the parties voluntarily with full knowledge of the consequences, rather than compelled by threat

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[4] Such variations already exist. As discussed in the Petition, federal retirees in Virginia received interest when unconstitutional taxes on their pension incomes were refunded by that State, whereas federal retirees in Oregon were denied it in the same circumstances. *See* Petition For A Writ of Certiorari at 9.

of sanctions and with no opportunity for a pre-deprivation challenge. Nor can Respondent plausibly argue that tax funds are exempt from the requirements of the Just Compensation Clause. *See Henderson Bridge Co. v. City of Henderson*, 173 U.S. 592, 614-15 (1899); *Kohl Industrial Park Co. v. Rockland County*, 710 F.2d 895 (2d Cir. 1983); *Acker v. Commissioner*, 258 F.2d 568 (6th Cir.), *aff'd*, 361 U.S. 87 (1958).

Respondent makes one further argument which must be corrected. He suggests that the State of Vermont retained interest in this case as a *quid pro quo* for extending a one-year statute of limitations on tax refunds under Vt. Stat. Ann. tit. 12, §517. *See* Brief in Opposition at 1, 6. Not only is Respondent's argument unsupported by the record, it is simply wrong. In the first place, any statute of limitations for taxpayers was tolled when Petitioners filed their Complaint as a class action on June 17, 1986.[5] In the second, the Vermont Supreme Court expressly declined to adopt Respondent's argument that a one-year limitations period applies since

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[5] Following the Vermont Supreme Court's decision in *Williams v. State (Williams II)*, 589 A.2d 840 (Vt. 1990), *cert. denied*, 502 U.S. 821 (1991), holding that motor vehicle tax refund requests had to be pursued administratively, Petitioners voluntarily dismissed their court action based on lack of subject matter jurisdiction and filed administrative refund requests on September 2, 1993. When Respondent took no action for the requests for four months, Petitioners filed this case in state court for a writ of mandamus, again as a class action. Under Vt. Stat. Ann. tit. 12, § 558(a)(2), there is a one-year tolling period for any case which is dismissed for lack of subject matter jurisdiction. Accordingly, any statute of limitations which may apply is still tolled.

section 517 does not govern administrative refund requests. As the State Supreme Court said:

> Neither Sec. 8914 nor any other provisions of chapter 219 of Title 32 ("motor Vehicle Purchase and Use Tax") specify a limitations period for actions before the Commissioner pursuant to Sec. 8914. *Cf.* 12 V.S.A. Sec. 517 (one-year limitation period on actions in court to recover taxes paid under protest). We do not here decide what, if any, statute of limitations is generally applicable to such actions.

Williams v. State, 589 A.2d 840, 847 n.10 (Vt. 1990), *cert. denied*, 502 U.S. 821 (1991).

CONCLUSION

The Petition for writ of certiorari should be granted.

Respectfully Submitted,

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May 1997